

No. 11535

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellants:

MESSRS. JONES & BRONSON and
MR. ALBERT OLSEN,

610 Colman Building,
Seattle, Washington.

Attorneys for Appellee:

MESSRS. CLARKE, CLARKE &
ALBERTSON,

1118 New World Life Building,
Seattle, Washington. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington
for King County

No. 372545

J. W. VAN METER, B. B. GRANNING and J. D.
M. TREECE,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation, MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants.

COMPLAINT

Come now the plaintiffs and for cause of action against the defendants complain and allege as follows:

I.

That the plaintiffs, B. B. Granning and J. D. M. Treece, are co-partners engaged in the business of lending money and refinancing in the City of Portland, Oregon, doing business under the name of Granning & Treece; that the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a corporation organized under the laws of Pennsylvania for the purpose of conducting an insurance business, and that it is doing business in the State of Washington; that the defendants, Morton Pinch and Abe Goldman, are co-partners con-

ducting a general insurance business in the City of Seattle under the firm name and style of Lipman & Esfeld.

II.

That on or about the 10th day of November, 1944, the plaintiff, J. W. Van Meter, was the owner of the following described property located in the State of Washington, to-wit:

One International Harvester Tractor, Model 18TDR, S# 5685-T7-BJ, M#TDRM 5427 equipped with one Carco Single Drum, Model O, S# 254 CJ 54 and one Isaacson Angle Blade Dozer, Model #DAW18, S#18105-8778; [2]

that at that time American Discount Company, a Washington corporation, had a mortgage on said property; that American Discount Company maintained its office and place of business in the same office and room as the defendants, Morton Pinch and Abe Goldman, conducted their business in the Smith Tower Building in the City of Seattle; that plaintiffs are informed and believe that at that time the owners and officers of American Discount Company had an interest in the business of the defendants, Morton Pinch and Abe Goldman, and that the defendants, Morton Pinch and Abe Goldman, were officers or had an interest in American Discount Company; that on or shortly prior to November 10, 1944, the firm of Lipman & Esfeld were the duly authorized agents of the defendant, Franklin Fire Insurance Company.

III.

That on or shortly prior to November 10, 1944, plaintiff, J. W. Van Meter, requested the defendants to issue to him a policy of insurance indemnifying him against loss or damage to the above described property which might be occasioned by fire, collision, upset, theft, loading and unloading, or other hazards; that pursuant to that request the defendants issued Policy No. TR8629, a copy of which is attached hereto and made a part hereof.

IV.

That the property insured by said policy was of a movable character, and at that time it was located in Lewis County, Washington; that the property insured was logging equipment, and the plaintiff, J. W. Van Meter, was engaged in the logging contract business; that the defendants knew said equipment was movable and that the plaintiff, J. W. Van Meter, would move from one locality to another for the purpose of taking advantage of logging contracts [3] when the opportunity afforded itself; that the defendants knew, or should have known, that said property might be moved into Oregon or the State of California; that the insurance requested by the plaintiff, J. W. Van Meter, which the defendants agreed to provide, was to cover the plaintiff, J. W. Van Meter, against the casualties requested without any restrictions as to the place in which the property might be located or moved to; that notwithstanding the agreement and under-

standing with respect to the coverage not being limited to any particular area, there was inserted in the policy a provision stating as follows: "This insurance covers only within the limits of the State of Washington"; that said provision was inserted without the knowledge or consent of the plaintiffs and contrary to the preliminary agreement between the plaintiff, J. W. Van Meter, and the defendants, relative to the extent of the coverage; that plaintiffs are informed and believe that the provision limiting coverage to the State of Washington was inserted by the person writing up said policy through inadvertence and mistake and contrary to the understanding and instructions of the defendants, Abe Goldman and/or Morton Pinch, who were acting as agents for the defendant; that the policy which was issued, copy of which is attached to this complaint, was never exhibited or delivered to the plaintiff, J. W. Van Meter, prior to the time of the fire hereinafter referred to; that until about April 20, 1945, said policy was kept in the office of the defendants, Morton Pinch and Abe Goldman, doing business as Lipman & Esfeld, either among the files of American Discount Company, or among the files of Lipman & Esfeld.

V.

That the plaintiff, J. W. Van Meter, paid to the defendants the premium of \$238.50, being the consideration for which this policy was issued. [4]

VI.

That on or about April 19, 1945, the plaintiff,

J. W. Van Meter, having prior thereto been engaged in logging in Lewis County, Washington, obtained a logging job in Wallowa County, Oregon, and moved the equipment hereinabove described to Wallowa County, Oregon; that shortly prior to moving said equipment, the plaintiff, J. W. Van Meter, discussed his contemplated move with the defendants, Morton Pinch and Abe Goldman, and the officials of American Discount Company, and that the defendant, Franklin Fire Insurance Company, by and through its agents, the defendants, Morton Pinch and Abe Goldman, knew of the contemplated move to Wallowa County, Oregon; that said equipment was moved to Wallowa County, Oregon, on or about April 19, 1945; that after said equipment was moved to Wallowa County, Oregon, the defendants and each of them knew that said equipment had been moved outside of the State of Washington into the State of Oregon.

VII.

That about the time of the move the plaintiff, J. W. Van Meter, made arrangements for the plaintiffs, B. B. Granning and J. D. M. Treece, to pay off the mortgages held by American Discount Company on this and other equipment, and extend to the plaintiff, J. W. Van Meter, a line of credit secured by mortgages on this and other equipment; that shortly after April 19, 1945, the mortgage and loans held by the American Discount Company on this and other equipment owned by J. W. Van Meter were paid off, and that on or about April

20, 1945, the policy attached hereto together with other papers were forwarded to the plaintiffs, B. B. Granning and J. D. M. Treece, at Portland, Oregon; that at that time the defendants, Morton Pinch and Abe Goldman, had said policy in their possession or under their control and directed or acquiesced in the forwarding and delivery of said policy to the plaintiffs, B. B. Granning and J. D. M. [5] Treece, in Portland, Oregon; that subsequent thereto and on or about May 18, 1945, the defendant, Franklin Fire Insurance Company, by and through its agents, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, issued an endorsement to be attached to said policy making a loss payable to Granning & Treece and their assigns, and that said endorsement was forwarded to the plaintiffs, B. B. Granning and J. D. M. Treece, at Portland, Oregon; that subsequent thereto the defendants, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, and acting as agents for the defendant, Franklin Fire Insurance Company, by letter and otherwise, made statements and representations to the effect that the policy of insurance, copy of which is attached hereto, was still in full force and effect.

VIII.

That in all matters and things alleged in this complaint, the defendants, Abe Goldman and Morton Pinch, were acting as the duly authorized agents of the defendant, Franklin Fire Insurance Company; that by reason of the aforesaid acts, the defendants waived the provisions of the policy pur-

porting to insure only while said equipment was in the State of Washington, and elected to treat said insurance as being in full force and effect notwithstanding the removal of said equipment from the State of Washington.

IX.

That on or about the 4th day of September, the plaintiff, J. W. Van Meter, having obtained a logging contract near Redding, California, moved said equipment to the State of California, near the town of Redding, California; that on or about October 3, 1945, a fire occurred in the proximity of this equipment, and said equipment was seriously damaged by fire; that at the time just prior to said fire, said piece of equipment was worth the sum of \$8,800.00; that the value after said fire was the sum of \$2,546.00; that the total loss or damage to said equipment was the sum of \$6,254.00; that [6] the plaintiff, J. W. Van Meter, promptly notified the adjuster for the defendant, Franklin Fire Insurance Company, and that on or about October 10, 1945, the defendant, Franklin Fire Insurance Company, denied liability under said policy on the ground that it was located outside the State of Washington at the time of the fire; that at no time prior to the date of said fire did the plaintiff, J. W. Van Meter, see or have possession of said policy of insurance, and that at no time prior to said fire were the plaintiffs, or any of them, aware of the presence in the policy of that provision purporting to limit it to the State of Washington.

IX.

That on or about January 21, 1946, the plaintiff submitted proof of loss showing damage to said equipment in the amount of \$6,254.00; that the defendants and each of them have wholly failed and refused to pay said claims for damages and any part thereof; that plaintiffs have complied with all the other terms and conditions of said policy which are in any wise a condition precedent to the right to recover under the terms of said policy.

Wherefore, plaintiffs pray for judgment and decree as follows:

1. That the policy attached hereto be reformed by striking therefrom that provision in the indorsement which states, "This insurance covers only within the limits of the State of Washington".

2. That the plaintiffs have and recover judgment against the defendants and each of them for the sum of \$6,254.00, together with interest at the rate of six per cent per annum from October 4, 1945, and that they also recover their costs and disbursements herein.

JONES & BRONSON,

Attorneys for the Plaintiffs.

State of Washington,
County of King—ss.

Albert Olsen, being first duly sworn, on oath deposes and says: that he is one of the attorneys for the plaintiffs in the foregoing action; that he makes this verification for and on behalf of said plaintiffs for the reason that they are not now

present; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

ALBERT OLSEN.

Subscribed and sworn to before me this 18th day of April, 1946.

/s/ NELLIE L. RITTER,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed 1945. Apr. 18 p.m. 2 11.

[Endorsed]: Filed in County Clerk's office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk; by R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court June 7, 1946. Millard P. Thomas, Clerk; by Percy Maddux, Deputy. [8]

Transportation Policy
Inland Marine Department

No. TR 8629

Stock Company
The Franklin Fire Insurance Co.
of Philadelphia, Pennsylvania

Amount \$11,300.00

Rate - Various

Premium \$238.50

By This Policy of Insurance

In consideration of the stipulations and conditions herein and of Two Hundred Thirty-Eight and

50/100 Dollars Premium Does Insure J. W. Van Meter of Lewis County, Randle, Washington.

On all equipment as described herein between the 10th day of November, 1944, and the 10th day of November, 1945, beginning and ending with Noon, Standard Time at the place where this policy is countersigned.

To an amount not exceeding Eleven Thousand Three Hundred and No/100 Dollars in any one casualty, either in case of partial or total loss, or salvage charges, or any other charges or expenses, or all combined.

On lawful goods and merchandise consisting principally of As Per Form Attached the property of the assured, or held by them in trust, or on commission, or on consignment, or on which they have made advances, or sold but not delivered, loss, if any, payable to assured and The American Discount Corporation, as their respective interests may appear.

Inland Marine Department

Contractors Equipment Floater Insurance

1. This policy only covers the Body and Running Gear of the following described property, including equipment thereof while attached thereto and/or located thereon, to not exceeding the amount or amounts shown below in respect of each of the machines described, against loss or damage thereto, directly caused by the risks and perils insured against, while located as described herein and not

elsewhere. Assured warrants all equipment insured hereunder to be in sound condition at the time of attachment of this insurance.

2. Schedule

Each machine or interest to be deemed separately insured.

Description, including any identifying marks	Manufacturer	Year Built	Amount of Insurance	Rate
One International Harvester Tractor, Model 18TDR, S#5685-T7-BJ, M#TDRM 5427				
Equipped with one Cargo Single Drum, Model G, S#254 GJ 54 and one Isaacson Angle Blade Dozer, Model #DAW18, S#18105-8778				
			\$8,800.00	2%
One Cargo Logging Arch, Model #707, Serial #407, Equipped with Athey Crawler Wheels, #2554 and #256				
			\$2,500.00	2½%

3. This insurance covers only within the limits of the State of Washington.

4. This Policy insures direct loss or damage caused by:

- (a) Fire and Lightning;
- (b) Cyclone, tornado or windstorm;
- (c) Flood (meaning rising navigable waters);
- (d) Collapse of bridges or Culverts (warranted total load not in excess of the indicated carrying capacity of any bridge or culvert);
- (e) Explosion, excepting explosions originating within steam boilers, or internal explosion;
- (f) Stranding, sinking, fire, collision, including general average or salvage charges, but

only while being transported on any regular ferry;

(g) Collision, derailment or overturn while in transit by railroad and/or motor vehicles. (The coming together of railroad cars and/or motor vehicles during coupling operations or the striking of curbing or any portion of the roadbed shall not be deemed a collision.)

(h) Collision and/or upset

(i) Theft

(j) Loading and/or unloading

With respect to perils outlined only in clause (h) and (i) it is understood and agreed that each claim for loss or damage shall be adjusted separately and form the amount of each loss when determined the sum of \$25.00 shall be deducted.

5. This Policy does not insure against:

(a) Loss or damage occasioned by the weight of load exceeding registered lifting capacity of any machine; or loss due to wear, tear or breakage incidental to actual operation;

(Clause (b) is deleted)

(c) Loss or damage caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions;

(d) Loss or damage to automobiles, trailers, semi-trailers, or similar conveyances, plans, blue prints, designs or specifications;

(e) Mechanical breakdown; nor against damage to electrical apparatus caused by electricity whether artificial or natural, unless fire ensues and then only for loss or damage by such ensuing fire;

(f) Loss or damage to property insured hereunder while located underground, while water borne, (except while on regular ferry lines) or after it has become a permanent part of any structure.

Special Conditions

(a) This Company shall not be liable for a greater proportion of any loss, damage or expense to the property insured hereunder than the amount insured hereunder bears to the actual cash value of the property destroyed or damaged, at the time such casualty shall occur, nor for more than the proportion which the amount insured under this policy bears to the total amount of insurance effected thereon; and in no event shall this Company be liable for an amount in excess of the amount insured hereunder in respect of each article or interest as set forth above, either in case of partial or total loss or salvage, or any other cost and expense, or all combined.

(b) Warranted that the assured hereunder does not hold any agreement and will not enter into any agreement with any Corporation, concern or individual to relieve said Corporation, concern or individual from any liability which the law or custom may impose upon them.

(c) Privilege is granted to use and operate the property insured [10] hereunder as customary to the business engaged in.

Attached to and forming part of Policy No. TR 8629 of the Franklin Fire Insurance Company.

Agency: LIPMAN & ESFELD

By MORTON PINCH.

Dated; November 10, 1944.

Pacific Northwest Marine Department

Endorsement

Contractors Equipment Classification

War Risk Exclusion Endorsement

Notwithstanding anything contained herein to the contrary, it is understood and agreed this policy does not insure against loss or damage arising from War, Invasion, Hostilities, Rebellion, Insurrection, Seizure, or Destruction under quarantine or customs regulations, Confiscation by order of any Government or Public Authority or risks of Contraband or Illegal Transportation and/or Trade.

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. TR 8629 of The Franklin Fire Insurance Company, issued to J. W. Van Meter, Dated at Seattle, Washington, November 10, 1944.

LIPMAN & ESFELD,

By MORTON PINCH.

This Policy is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specially referred to and made a part of this policy, but this policy shall not be valid unless endorsement is attached hereto, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached.

Provisions required by law to be stated in this policy—this policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents this 10th day of November, 1944, but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at Seattle Washington.

W. BEYER,
Secretary.

H. V. SMITH,
President.

Countersigned this 10th day of November, 1944.

LIPMAN & ESFELD,
By MORTON PINCH,

ak 11/15/44

Agent. [11]

Conditions

1. Territorial Limits. This policy covers only within the limits of the United States and Canada.

2. Valuation. All goods and merchandise are, by agreement, valued at amount of invoice or if not under invoice, then at cash market value on date and at place of shipment, but this Company shall not be liable for a greater proportion of any loss or damage than the amount of insurance hereunder bears to 100% of the valuation of all of the goods and merchandise at risk at the time and place of any one disaster.

3. Other Insurance. It is expressly agreed that this insurance shall not cover to the extent of any other insurance whether prior, simultaneous or subsequent hereto in date, and by whomsoever effected, directly or indirectly covering the same property, and this Company shall be liable for loss or damage only for the excess value beyond the amount of such other insurance.

4. Misrepresentation and Fraud. This entire policy shall be void if the assured or his agent, has concealed or misrepresented or shall conceal or misrepresent in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the assured or his agent shall make any attempt to defraud this Company either before or after a loss. (Policies issued in the State of Massachusetts are subject to the provisions of the Mass. Act of 1907, Chapt. 576, Section 21.)

5. Machinery. In case of loss or injury to any part of a machine consisting when complete for sale or use of several parts, this Company shall only be liable for the value of the part lost or damaged.

6. Labels. In case of loss affecting labels, capsules or wrappers, the loss shall be adjusted on the basis of an amount sufficient to pay the cost of new labels, capsules or wrappers, and reconditioning the goods.

7. Benefit of Insurance. Warranted by the assured that this insurance shall not enure directly or indirectly to the benefit of any carrier, bailee or other party, by stipulation in bill of lading or otherwise, and any breach of this warranty, shall render this policy of insurance null and void.

8. Notice of Loss. Every claim for a loss under this policy shall be immediately reported in writing with full particulars to the Home Office of this Company at 59 Maiden Lane, New York, N.Y., or to the agent of the Company issuing this policy, and a detailed sworn proof of loss shall be filed with the Company or its said agent within four months of the date of the loss. A failure by the assured to file either such claim or such proof shall invalidate the claim. All adjusted claims shall be due and payable thirty days after the presentation and acceptance of proofs of loss at the office of this Company.

9. Sue and Labor. In case of loss or damage it shall be lawful and necessary for the assured, their factors, servants or assigns, to sue, labor and

travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance; nor shall the acts of the assured or this Company in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or acceptance of an abandonment. In event of expenditure for salvage, salvage charges, or sue and labor expenses, the liability under this policy shall be limited to such proportion of such amounts as the amount of this insurance bears to the total value of the merchandise involved.

10. Subrogation. In all cases of loss the assured shall, at the request of this Company or its agents, assign and subrogate all their rights and claims against others to this Company at time of payment to an amount not exceeding the sum paid by this Company; and permit suit to be brought in the assured's name, but at this Company's expense, and the assured further agrees to render all reasonable assistance in the prosecution of said suit or suits. This Company is not liable for any loss, which, without [12] its consent, has been settled or compromised with others, who may be liable therefor.

11. Impairment of Liability. Any act or agreement by the assured, either before or after loss, whereby any right of the assured to recover the full value of, or amount of damage to, any property lost or injured and insured hereunder, against any carrier, bailee or other party liable therefor, is released, impaired or lost, shall render this policy

null and void, but the insurer's right to retain or recover the premium shall not be affected. The assured may, however, without prejudice to this insurance, accept the ordinary bills of lading issued by carriers whereby the liability of any railroad or Express Company is limited to \$50.00 on any shipment but not less than 50 cents per lb. actual weight on any shipment in excess of 100 lbs. and whereby the liability of public truckmen or motor carriers is limited to not less than \$50.00 on each bale, case or shipping package.

12. **Ascertainment of Loss.** This Company shall not be liable beyond the value of the merchandise insured hereunder, as provided herein, and the amount of loss or damage shall be ascertained or estimated according to such value with proper deduction for depreciation, however, caused, and shall in no event exceed what it would then cost the assured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the assured and this Company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this Company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this Company in accordance with the terms of this policy. It shall be optional, however, with this Company, to take all or any part of the articles at such ascertained or appraised

value and also to repair or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty days after receipt of the proof herein required of its intention so to do; but there can be no abandonment to this Company of the property described.

13. Appraisal. In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent, and disinterested appraisers, the assured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage, and failing to agree shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisal and umpire.

14. Reinstatement. Every claim paid hereunder reduces the amount of insurance by the sum so paid, but it is a condition of this policy that in the event of loss, the assured agrees to pay the insurer additional premium or premiums at pro rata rates, on the amount of such loss and to reinstate the full amount of this policy, such reinstatement to take effect immediately upon the occurrence which occasioned the loss, and the charges therefor to be made from such date.

15. Cancellation. This policy shall be cancelled

at any time at the request of the assured; or by the Company by giving fifteen (15) days' notice of cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having actually been paid, the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate; except that when this policy is cancelled by this Company by giving notice it shall retain only the pro rata premium. Notice of cancellation mailed to the last known address of the assured shall be a sufficient notice; the check of this Company, or its agents, when similarly mailed, shall be a sufficient tender of any unearned premium. [13]

16. Suit Against Company. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the requirements of this policy, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then, and in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.

17. Agent of Assured. If any party or parties other than the assured have procured this policy, or any renewal thereof, or any endorsement thereon, they shall be deemed to be the agents of the assured

and not of this Company in any and all transactions and representations relating to this insurance.

18. Assignment of Policy. This policy shall be void if assigned or transferred without the written consent of this Company. [14]

[Title of Superior Court and Cause.]

DEMURRER

Come now the defendants, Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, and demur to the plaintiffs' complaint for the reason and upon the ground that the complaint does not state facts sufficient to constitute a cause of action, as against said defendants.

CLARKE, CLARKE &
ALBERTSON,

Attorneys for Defendants,
Morton Pinch and Abe
Goldman, co-partners,
d/b/a Lipman & Esfeld.

Copy rec'd May 8, 1946. Jones & Bronson, Attorneys for Plaintiff. K.F.

[Endorsed]: Filed 1946, May 9 a:m: 9 30.

[Endorsed]: Filed in County Clerk's office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk; by R. C. Parkhurst, Deputy.

[Endorsed]: Filed U.S.D.C. June 7, 1946. [15]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Calvin S. Hall, Presiding Judge of the Superior Court of the State of Washington for King County, or to any other Judge who may be acting as Presiding Judge of said Superior Court of the State of Washington for King County at the time of the presentation of this petition:

Comes now the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, one of the defendants in the above-entitled cause, and respectfully petitions the above-entitled Court for the removal of this cause to the United States District Court for the Western District of Washington, Northern Division, and for cause for removal states:

I.

That this action was commenced by filing summons and complaint with the Clerk of the above-entitled Court upon the 18th day of April, 1946, and by service of summons and complaint upon the Insurance Commissioner of the State of Washington, as statutory attorney in fact for this petitioner for the purpose of receiving service of process upon the 19th day of April, 1946, and is now pending in the above-entitled Court.

II.

That the above-named plaintiff, J. W. Van Meter was, at and prior to the date of the commencement of this action and at all [16] times thereafter and is now a citizen and resident of the state of Washington, residing in Randle, Lewis County, Washington.

That the plaintiffs, B. B. Granning and J. D. M. Treece, were, at and prior to the date of the commencement of this action and at all times thereafter, and are now, citizens and residents of the state of Oregon, residing in Portland, Multnomah County, Oregon.

That the defendants, Morton Pinch and Abe Goldman, co-partners d/b/a Lipman & Esfeld, were, at and prior to the date of the commencement of this action and at all times thereafter, and are now, citizens and residents of the state of Washington, residing at Seattle, King County, Washington.

III.

That the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, is now and was, at and prior to the time of the serving and filing of this complaint, and at all times herein mentioned, a corporation duly organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, and a non-resident of the State of Washington.

IV.

That this action is one of a civil nature, of which the District Courts of the United States are given original jurisdiction; that the complaint alleges, in substance, that petitioner insurance company, in November, 1944, issued to the plaintiff, J. W. Van Meter, a policy insuring him against the hazard of loss by fire to certain logging equipment of a movable nature then located in Lewis County, Washington, through its agents, the defendants, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, and that said policy contained a loss payable clause to the American Discount Company, in which concern Pinch and Goldman were interested; that at the time of the issuance of said policy, defendants knew said equipment to be movable and that the insured might move to Oregon or California to take [17] advantage of logging contracts; that, although the insurance requested was without restriction as to locality of the insured property, the defendants nevertheless inserted the provision that "this insurance covers only within the limits of the state of Washington," which said provision was inserted without the knowledge or consent of the plaintiffs, contrary to the preliminary agreement and through inadvertence and mistake; that said policy was never exhibited or delivered to the plaintiff, Van Meter, and was, until April 20, 1945, kept either in the office of the defendants, Morton Pinch and Abe Goldman, or in the office of the American Discount Company; that in April of 1945, the plain-

tiff, J. W. Van Meter, moved the insured equipment to Oregon, having first discussed such contemplated move with the defendants, Morton Pinch and Abe Goldman, and that arrangements were then made whereby the plaintiffs, B. B. Granning and J. D. M. Treece, would pay off the American Discount mortgages and refinance the equipment; that this arrangement was carried out and on or about April 20, 1945, the insurance policy was forwarded to B. B. Granning and J. D. M. Treece and that on May 18, 1945, the defendants, Morton Pinch and Abe Goldman, as agents of the defendant insurance company, issued an endorsement changing the loss payee from American Discount Company to B. B. Granning and J. D. M. Treece, said agents at that time making statements and representations to the effect that the policy of insurance was still in full force and effect; that on or about the 14th day of September, 1945, the logging equipment was moved to California, near the town of Redding; that on October 3, 1945, it was damaged in a forest fire to the extent of \$6,254.00; that the defendant fire insurance company was given notice thereof but denied liability on the ground that its coverage was restricted to losses occurring while the property was located within the state of Washington; wherefor plaintiffs pray that the policy be reformed to eliminate the restriction of coverage to losses occurring within the state of Washington and that they recover judgment [18] against the defendants for the amount of damage to the equipment, plus interest and costs.

V.

That the plaintiffs in this cause have improperly and fraudulently joined as defendants in this action the said Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, who were, at the time of the commencement of this suit and at all times herein mentioned, and are now, citizens of the State of Washington, for the sole and only purpose of attempting to defeat or prevent a removal of this cause by your petitioner to the United States District Court for the Western District of Washington, Northern Division; that, as herein set forth and as will more fully appear upon an inspection of the pleadings of said plaintiffs in this cause, the said Morton Pinch and Abe Goldman are not now and never were necessary or proper parties defendant in this cause and in their pleadings herein said plaintiffs wholly fail to show any cause of action or right of recovery as against said Morton Pinch and Abe Goldman, or either of them; that said action is based upon an obligation stated to have arisen out of a contract of insurance issued by this petitioner; that neither of the said Morton Pinch or Abe Goldman are parties to said contract; that it is alleged that anything they did with reference thereto they did as agents of this petitioner and that they could not, therefore, be held individually liable thereon.

VI.

That there is in this action a separable controversy between citizens and residents of the States

of Washington and Oregon, to-wit, plaintiff J. W. Van Meter, a citizen and resident of the State of Washington, plaintiffs B. B. Granning and J. D. M. Treece, citizens and residents of the State of Oregon, and a citizen and resident of the State of Pennsylvania, to-wit, the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, defendant; that said separable controversy is between the plaintiffs [19] and your petitioner and consists of an alleged breach of an obligation under an insurance policy stated to have been issued by petitioner to the plaintiffs as insured and loss payees; that the liability claimed against your petitioner is a sole and separate liability allegedly arising out of its contract of insurance and its alleged obligations thereunder; that neither the defendant Morton Pinch nor the defendant Abe Goldman has any interest whatsoever in said controversy; that said separable controversy can be fully determined between plaintiffs and your petitioner, both as to issues of law and fact, without affecting the interest of the defendants Morton Pinch and Abe Goldman, or either of them, and that said defendants are not indispensable, necessary or proper parties to the separable controversy between plaintiffs and petitioner.

VII.

That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, to-wit, the sum of \$6,254.00; that the matter in con-

troversy in the separable controversy herein before referred to between plaintiffs and this petitioner exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, to-wit, the sum of \$6,254.00.

VIII.

That the time has not expired within which this petitioner, under the laws of the State of Washington, is required to plead or answer to the complaint of the plaintiffs and that petitioner herewith presents a good and sufficient bond in the sum of \$500.00, as provided by statute in such cases, duly conditioned as required by law, and that petitioner will enter into the United States District Court for the Western District of Washington, Northern Division, within thirty (30) days from the date of the filing of this petition a certified copy of the record in this suit and conditioned to pay all costs that may be awarded by the United States District Court for the Western District of Washington, Northern Division, if said [20] District Court should hold that said suit is wrongfully or improperly removed thereto.

Wherefore your petitioner prays that this Court proceed no further herein except to order the removal as required by law and to accept the bond presented herewith and direct that the transcript

of the record herein be made and certified as provided by law.

CLARKE, CLARKE &
ALBERTSON,
GEORGE W. CLARK,
Attorneys for Defendants.

State of Washington,
County of King—ss.

George W. Clarke, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, above-named, who is making the foregoing petition and asking for the removal of this cause from the Superior Court of the State of Washington for King County to the United States District Court for the Western District of Washington, Northern Division; that he is authorized to verify this petition on its behalf; that he makes this affidavit for the reason that the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a foreign corporation and no officer thereof is now in the State of Washington; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

GEORGE W. CLARKE.

Subscribed and sworn to before me this 3rd day of May, 1946.

ROSE MARIE McCLUNG,
Notary Public in and for the State of Washington,
residing at Seattle. [21]

Copy received 5/9/46. Jones & Bronson, Atty. for Pl.

Filed 1946, May 15, a.m. 10 35.

Filed in County Clerk's Office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk. By R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court June 7, 1946. Millard P. Thomas, Clerk. By Percy Maddux, Deputy. [22]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

This cause coming on duly and regularly for hearing upon the petition and bond of the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, for an order transferring this cause to the United States District Court for the Western District of Washington, Northern Division, and it appearing to the Court that the said defendant has filed a petition for such removal in due form of law and within the required time, and that said defendant has filed its bond duly conditioned, with good and sufficient sureties as provided by law, and that said defendant has given plaintiffs and other parties due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, Therefore, said petition and bond are hereby accepted and approved, and it is hereby ordered and adjudged that this cause be and the same is hereby removed to the United States District Court for the Western District of Washington, Northern Division, and the Clerk of this Court is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in Open Court this 15th day of May, 1946.

CALVIN S. HALL,
Judge.

Presented by:

GEORGE W. CLARKE,
Attorney for Defendant.

Filed 1946, May 15 a.m. 10 46.

Filed in County Clerk's Office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk. By R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court June 7, 1946. Millard P. Thomas, Clerk. By Percy Maddux, Deputy. [23]

[Title of Superior Court and Cause.]

BOND OF REMOVAL

Know All Men By These Presents: That the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, as principal, and the American Bonding Company of Baltimore, a corporation organized and existing under and by vir-

tue of the laws of the State of Maryland, duly authorized to carry on a surety bond business in the State of Washington and duly authorized to execute this bond, as surety, are held and firmly bound unto J. W. Van Meter, B. B. Granning and J. D. M. Treece, plaintiffs in the above-entitled action, their successors and assigns, in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

The conditions of this obligation are such that whereas said Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, has applied by petition to the Superior Court of the State of Washington for King County for the removal of a certain cause therein pending wherein J. W. Van Meter, B. B. Granning and J. D. M. Treece are plaintiffs, and said Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, are defendants, to the District Court of the United States for the Western District of [24] Washington, Northern Division, for further proceedings, on grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed.

Now, Therefore, if your petitioner, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, shall enter in said District

Court of the United States for the Western District of Washington, Northern Division, aforesaid, within thirty (30) days from the date of filing said petition, a certified copy of the record of such suit and shall pay, or cause to be paid, all costs that may be awarded therein by said District Court of the United States if said Court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void; otherwise, to remain in full force and effect.

Dated this 8th day of May, 1946.

FRANKLIN FIRE INSUR-
ANCE COMPANY OF
PHILADELPHIA, PENN-
SYLVANIA,

By GEORGE W. CLARKE,
Its Attorney.

[Seal] AMERICAN BONDING COM-
PANY OF BALTIMORE,
By ARTHUR EAGLE,
Its Attorney-in-Fact.

Copy received 5/19/46. Jones & Bronson, Attys.
for Pl.

Filed 1946, May 15 a.m. 10 35.

Filed in County Clerk's Office, King County,
Washington, May 24, 1946. Norman R. Riddell,
Clerk. By R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District
Court June 7, 1946. Millard P. Thomas, Clerk. By
Percy Maddux, Deputy. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1563

J. W. VAN METER, B. B. GRANNING and J. D.
M. TREECE,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a Corporation, MORTON PINCH and ABE
GOLDMAN, Co-Partners, d/b/a LIPMAN &
ESFELD,

Defendants.

ANSWER OF DEFENDANT, FRANKLIN FIRE
INSURANCE COMPANY OF PHILADEL-
PHIA, PENNSYLVANIA

Comes now the Franklin Fire Insurance Com-
pany of Philadelphia, Pennsylvania, a corporation,
one of the defendant in the above-entitled action,
and, for answer to plaintiffs' complaint, states:

I.

Answering paragraph II, defendant admits that
the plaintiff, J. W. Van Meter, was the owner of
the equipment set out, upon the date stated; that
said equipment was mortgaged to the American
Discount Company; that the American Discount
Company and defendants, Morton Pinch and Abe

Goldman occupied adjoining office space in the same room in the Smith Tower Building in the city of Seattle; that on and shortly prior to November 10, 1944, the firm of Lipman & Esfeld was a duly licensed local agent of this defendant, having only the power existing under the statutes of the State of Washington by virtue of such license, and denies each and every other allegation in said paragraph contained.

II.

Answering paragraph III, defendant admits that, at the request of the American Discount Company, it issued its policy No. TR-8629, a copy of which is attached to plaintiffs' complaint, and denies each and every other allegation in said paragraph contained. [26]

III.

Answering paragraph IV, defendant admits that the description of the property insured was of such a nature as to indicate that it was movable; admits that the policy contained a provision stating "This insurance covers only within the limits of the State of Washington"; admits that this policy was held in the possession of the American Discount Company as loss payee until on or about April 20, 1945; and denies each and every other allegation in said paragraph contained.

IV.

Answering paragraph V, defendant admits that the premium on said policy was paid on behalf of the plaintiff, J. W. Van Meter, and denies each and every other allegation in said paragraph contained.

V.

Answering paragraph VI, defendant admits that the plaintiff, J. W. Van Meter, having prior thereto been engaged in logging in Lewis County, Washington, did, on or about April 19, 1945, move the equipment described in the policy of insurance sued upon to Wallowa County, Oregon, and denies each and every other allegation in said paragraph contained.

VI.

Answering paragraph VII, defendant admits that at some time prior to April 20, 1945, the plaintiff, J. W. Van Meter, made arrangements with plaintiffs, B. B. Granning and J. D. M. Treece, whereby B. B. Granning and J. D. M. Treece paid off the mortgage held by American Discount Company, substituting their own therefor, and that on or about April 20, 1945, the American Discount Company forwarded the policy sued upon to B. B. Granning and J. D. M. Treece; that thereafter and at the request of B. B. Granning and J. D. M. Treece an endorsement was issued under date of May 18, 1945, by Lipman & Esfeld as agent and forwarded to B. B. Granning and J. D. M. [27] Treece recog-

nizing them as loss payees under the policy, and denies each and every other allegation in said paragraph contained.

VII.

Answering paragraph VIII, defendant states that in counter-signing the policy sued upon and the endorsement referred to, the defendants, Morton Pinch and Abe Goldman, were acting as licensed agents of this defendant, and denies each and every other allegation in said paragraph contained.

VIII.

Answering paragraph IX, this defendant admits that on or about the 4th day of September, 1945, the plaintiff, J. W. Van Meter, having obtained a logging contract near Redding, California, moved said equipment to the State of California near the town of Redding, California; that on or about October 3, 1945, a fire occurred which damaged said equipment, but denies that the value of said equipment or the extent of damage were in the amounts as alleged by the plaintiffs; admits that this defendant received notice of said fire and that it has denied any and all liability on account thereof on the ground that said loss occurred in the State of California whereas the coverage of the policy was restricted to the state of Washington; and denies each and every other allegation in said paragraph contained.

IX.

Answering the second paragraph numbered IX, defendant admits that on or about January 21, 1946, it received a document entitled "Proof of Loss" claiming damage to the insured equipment in the amount of \$6,254.00; admits that it has refused to pay said claim or any part thereof; and denies each and every other allegation in said paragraph contained.

For further answer, and by way of affirmative defense, defendant states: [28]

I.

That at the request of the American Discount Company plaintiff issued its policy No. TR-8629, copy of which is attached to plaintiffs' complaint, which said policy provided, among other things, as follows:

"This insurance covers only within the limits of the State of Washington;"

and that a copy of said policy was mailed to the plaintiff, J. W. Van Meter, at or about the time of the issuance thereof.

II.

That the loss referred to in plaintiffs' complaint occurred outside the State of Washington and within the State of California.

Wherefore defendant prays that plaintiffs' com-

plaint be dismissed and that defendant have and recover its costs and disbursements herein incurred.

CLARKE, CLARKE &
ALBERTSON,
GEORGE W. CLARKE,

Attorneys for Defendant,
Franklin Fire Insurance
Company of Philadelphia,
Pennsylvania.

Copy received June 7, 1946. Jones & Bronson,
Attorney for Pltff.

[Endorsed]: Filed June 7, 1946. [29]

[Title of District Court and Cause.]

DEMAND FOR TRIAL BY JURY

To Franklin Fire Insurance Company of Philadelphia, Pennsylvania, Morton Pinch and Abe Goldman, defendants, and their attorneys, Clarke, Clarke & Albertson:

Please take notice that Plaintiff demands trial by jury in this action.

JONES & BRONSON,
ALBERT OLSEN,
Attorneys for Plaintiffs.

Received June 14, 1946. Clarke, Clarke & Albertson. By R. M. McClung.

[Endorsed]: Filed June 15, 1946. [30]

[Title of District Court and Cause.]

MOTION TO STRIKE DEMAND FOR TRIAL
BY JURY AND SET CASE FOR TRIAL
BEFORE THE COURT

Comes now the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and moves that plaintiffs' demand for trial by jury heretofore filed in the above-entitled action be stricken and that said case be set for trial before the Court for the reason and upon the ground that, as appears from plaintiffs' complaint, the action is of equitable cognizance, consisting of a request for reformation of a policy of insurance and is not a proper case for trial before a jury.

CLARKE, CLARKE &
ALBERTSON,
GEORGE W. CLARKE,

Attorneys for Defendant,
Franklin Fire Insurance
Company of Philadelphia,
Pennsylvania.

Received copy 6/17/46. Jones & Bronson, By
V. Miller, Atty. for Plaintiffs.

[Endorsed]: Filed June 17, 1946. [31]

[Title of District Court and Cause.]

ORDER STRIKING JURY DEMAND

This matter having come on duly and regularly for hearing before the undersigned Judge of the

above-entitled Court upon Monday, the 22nd day of July, 1946, upon motion of the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to strike plaintiffs' demand for a jury trial, and the Court having listened to arguments of counsel and being fully advised in the premises does hereby find that plaintiffs' complaint seeks relief in equity, to-wit, the reformation of an insurance policy; that plaintiffs are not entitled to a jury trial as a matter of right; that this is not a case wherein the Court wishes to call an advisory jury; and

It Is Therefore Ordered that plaintiffs' demand for a jury trial be and the same is hereby denied and stricken.

Done In Open Court this 24th day of July, 1946.

JOHN C. BOWEN,

Judge.

Presented by:

GEORGE W. CLARKE,

Attorney for Defendants.

[Endorsed]: Filed July 24, 1946. [32]

[Title of District Court and Cause.]

JUDGMENT OF DISMISSAL AS TO DEFENDANTS MORTON PINCH AND ABE GOLDMAN, CO-PARTNERS, D/B/A LIPMAN & ESFELD

This matter having come on duly and regularly for hearing before the undersigned Judge of the

above-entitled Court upon Monday, the 22nd day of July, 1946, upon the demurrer of the defendants, Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, filed in the State Court prior to the removal of said cause to the above-entitled Court, and the Court having considered said demurrer as a motion to dismiss, and having listened to arguments of counsel and being fully advised in the premises, and finding that plaintiffs' complaint does not state a cause of action as against said defendants, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, and that the same should be dismissed as to them; now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs' complaint be and the same is hereby dismissed as to the defendants Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, and that said defendants be and they are hereby granted judgment against the plaintiffs for their costs, to be taxed.

Done In Open Court this 24th day of July, 1946.

JOHN C. BOWEN,

Judge.

Presented by:

GEORGE W. CLARKE,

Attorney for Defendants.

[Endorsed]: Filed July 24, 1946. [33]

[Title of District Court and Cause.]

JUDGMENT OF DISMISSAL

The above-entitled action having come on duly and regularly for trial before the undersigned Judge of the above-entitled Court upon the 16th day of September, 1946, and trial thereof having continued to the 17th day of September, 1946, and plaintiffs having completed the presentation of their evidence and having rested their case, and the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, having thereupon moved for a dismissal upon the grounds that upon the facts and the law plaintiffs had shown no right to relief, and the Court having listened to argument of counsel and being fully advised in the premises;

Now, Therefore, the Court Does Hereby Find, Order, Adjudge and Decree that the plaintiffs have shown no right to relief against said defendant; that the said defendant's motion is well taken, and that the same be and it is hereby granted, and that plaintiffs' complaint be and the same is hereby dismissed, with prejudice.

Done In Open Court this 18th day of September, 1946.

HOWARD C. SPEAKMAN,
Judge.

Presented by:

GEORGE W. CLARKE,
Attorney for Defendants.

[Endorsed]: Filed Sept. 18, 1946. [34]

PLAINTIFFS' EXHIBIT 2

Cause 1563. Admitted Sept. 16, 1946.

Standard Forms Bureau Form 199-S (July, 1917)

Former Mortgage Satisfied

Endorsement Blank

Endorsement dated May 18, 1945. Agency at Seattle, Washington.

Attached to Policy No. TR-8629 of the Franklin Fire Insurance Co.

Issued to J. W. Van Meter.

Commencement of Policy—11-10-44.

Expiration of Policy—11-10-45.

Amount insured—\$11,300.

Loss, if any, subject to the terms and conditions of this policy, payable to Granning & Treece and/or their Assigns.

All other terms and conditions remain unchanged.

LIPMAN & ESFELD,

By MORTON PINCH,

Agent. [35]

PLAINTIFFS' EXHIBIT 3

Cause 1563. Admitted Sept. 16, 1946.

Morton Pinch

A. J. Goldman

Lipman & Esfeld

General Insurance

205 Smith Tower

Seattle, Wash.

Telephone MAin 2841

May 1, 1945

Mr. John Van Meter,
Box 892,
Randle, Washington.

Dear Johnnie:

RE: Trinity Universal Policy No. 906675.

We just received a letter from Granning & Treece of Portland, Oregon, requesting us to issue a "Loss Payable Endorsement" on the above policy.

Before this "Loss Payable Endorsement" can be issued it is necessary for your account to be paid up in full. You will note by the attached statement that there remains a balance of \$204.86. May we suggest that you immediately send us your check for this amount so we in turn can forward this Loss Payable Endorsement to this firm.

Yours very truly,

LIPMAN & ESFELD,

By /s/ A. J. GOLDMAN.

AJG:by

P.S. Are you still interested in securing that life insurance policy that you and I discussed some time ago? In the event you have misplaced or lost the proposal that was presented to you we are mailing you a duplicate. If you are interested please advise us and we in turn will authorize Dr. Leonard Asmundson of Morton, Washington, to make the usual medical examination. [36]

Statement

Lipman & Esfeld
General Insurance
205 Smith Tower
Seattle

5-8-45

J. W. Van Meter,
Box 892,
Randle, Wash.

Date	Item	Debit	Credit
11-10-44	Franklin 8629	\$238.50	
3-7-45	Trinity 906675		\$99.89
4-28-45	Trinity 740067	66.25	
		<hr/>	<hr/>
		\$304.75	99.89
		99.89	
		<hr/>	
		\$204.86	

For The Consideration Of
Mr. John Van Meter

Plan:

The Equitable's 20-Payment Life Contract.

Deposit:

\$177.10 annually.

Dividends:

The dividends are payable annually commencing the end of the second year. They may be withdrawn each year, or may be allowed to accumulate so as to increase the returns at maturity, or shorten the premium-paying period. Not guaranteed—based upon 1945 schedule.

For the Beneficiary:

In the event of your premature death, the Equitable would pay to the beneficiary designated by you, \$5,000.00, plus any dividends to the credit of the contract.

End of 20 Years:

At the end of 20 years, the policy will be completely paid-up for its insurance value of \$5,000.00. No further deposits are required, but the policy will continue to participate in annual dividends and increase in cash value.

At Ages 60 or 65:

Should you elect to convert the contract into cash or income at ages 60 or 65, the following options would be available:

	60	65
A. Guaranteed Cash Value	\$3,330.00	\$3,615.00
Dividend Accumulations	1,675.00	1,985.00
	<hr/>	<hr/>
Total Cash Available	\$5,005.00	\$5,600.00
B. Guaranteed Monthly Life Income,		
10-year certain	\$ 18.68	\$ 22.77
Dividend Accumulations	9.04	12.50
	<hr/>	<hr/>
Total Monthly Life Income	\$ 28.08	\$ 35.27

Paid-up Through Dividends:

This contract could be made fully paid-up in 14 years, through the use of the dividend accumulations. No. further deposits would be required, but the contract would continue to participate in annual dividends, and increase yearly in cash value.

Submitted by:

A. J. GOLDMAN.

31/m

E&OE [38]

PLAINTIFF EXHIBIT 4

Wallowa, Oreg.

May 14, 1945

Lipman and Esfeld

Gentlemen:

It is not clear to me what this Policy No. 906675 is for—I was under the impression that all insurance was included in the bill paid off by Granning and Treece of Portland when the contract was re-

financed. I would like you to send me a copy showing how you figured the interest refund on my loan.

In any case if I owe this bill for \$204.86 it will be during the month of June befor I can possible have funds to take care of it.

It was a heavy expense to get our equipment moved over here and set up to log. However, we are logging and earning but will be at least June befor we have any money over our wages & taxes.

Trusting you can understand our situation.

Respectfully yours,

J. W. VAN METER.

Cause 1563. Admitted Sep. 16, 1946.

PLAINTIFF EXHIBIT 5

Morton Pinch

A. J. Goldman

Lipman & Esfeld
General Insurance

205 Smith Tower
Seattle
Telephone Main 2841

August 17, 1945

Mr. J. W. VanMeter
Wallowa, Oregon

Dear Mr. Van Meter:

This is in response to your letter of August 10th stating that you were under the impression that the insurance we were carrying on your equipment was

cancelled when you were refinanced by Granning & Treece of Portland.

We wrote you concerning this matter on May 18th in answer to your letter of May 14th wherein we explained how the balance of \$204.86 was arrived at. On the same date we wrote Granning & Treece in response to their request to send them Loss Payable Clauses under your insurance, from the American Discount Company to themselves. We believe if you check with them you will find that they did not write any insurance on the equipment that we had previously insured.

Under your logging equipment policy, as we previously advised you, the 1937 Dodge Truck and 1941 Paige Trailer were eliminated March 7th, which left only the 1943 White Truck and 1943 Paige Trailer covered. Consequently we only had one truck and trailer covered for you which expired August 9th, and any time any equipment was sold credit was allowed you. We are very certain that you have not had duplicate coverage in any form as Granning & Treece would not have ordered Loss Payable Clauses on your coverage from us if they had previously insured this equipment.

The \$66.25 still due us, as previously advised you, is on the Buick Coupe, which apparently was not mortgaged to Granning & Treece. This amount is still outstanding and if, after making this explanation to you, you find there is still some question we ask that you return the policy to us and pay the pro rata earned premium which will amount to

one-third of this amount. Therefore, will you do one of two things, either send us your check for the full amount or return the policy, Trinity No. 740067, with your check for \$22.08 by return mail.

Your immediate attention will be appreciated.

Very truly yours,

LIPMAN & ESFELD,
By MORTON PINCH.

MP/w

Cause 1563. Admitted Sep. 16, 1946. [40]

PLAINTIFF EXHIBIT 13

Western Union

1945 Oct 4 pm 6 55

3645 N. Mine St., Portland

TA13

T. EAA850 48 NL Collect—Seattle Wash 4

J. W. Van Meter, 89c

Redding, Calif Box 501

Re urwire October 4 claim on tractor referred to Insurance Company who will have adjuster contact you Wired you September 28 regarding premium on Buick unpaid which did not receive answer to

Necessary that you send us this amount immediately in order not to prejudice your present claim

LIPMAN & ESFELD.

4 28. .

Cause 1563. Admitted Sep. 16, 1946.

[41]

PLAINTIFF EXHIBIT 14

Morton Pinch

A. J. Goldman

Lipman & Esfeld
General Insurance205 Smith Tower
Seattle
Telephone Main 2841

October 30, 1945.

Granning & Treece
S. E. 8th & Hawthorne Blvd.
Portland 14, Oregon

Re: J. W. VanMeter — Franklin Policy TR-8629

Gentlemen:

This is to advise you of the expiration of the above captioned policy on November 10, 1945, which has loss payable in your favor. If we can be of any service to you in connection with same, please let us know.

Very truly yours,

LIPMAN & ESFELD,
By MORTON PINCH.

MP-W.

C.C. J. W. Van Meter

Cause 1563. Admitted Sep. 16, 1946. [42]

PLAINTIFF EXHIBIT 15

May 18, 1945

Mr. John W. Van Meter
Box 892
Randle, Washington

Dear Johnnie:

The enclosed letter is self-explanatory. It is necessary for us to go on record to the finance company of the balance outstanding which we have accordingly done.

In response to your letter regarding the arrival of the balance of \$204.86 it is as follows:

You had paid up the policy on the fleet of trucks which was issued in August. You had issued a contractors' equipment policy on your International Tractor and cargo logging arch in the amount of \$11,300.00 the premium on which amounting to \$238.50. On the fleet policy you had eliminated in March the Dodge Truck and Page trailer for which a credit was given of \$99.89.

This results in the balance indicated to the finance company. You renewed your insurance on your Buick Coupe in April, the premium being \$66.25. The total, therefore, amounts to \$204.86 due us. We do not know if the Buick was mortgaged as no loss payable is being requested for it and we are not calling to their attention the premium thereon. We think to simply matters it would be advisable

for you to approve payment by them of \$138.61, then you can take care of the insurance on the Buick.

We trust that this explanation is clear to you but should there be any question on same please let me know.

Yours very truly,

LIPMAN & ESFELD,
By MORTON PINCH.

MP:by

Cause 1563. Admitted Sep. 16, 1946. [43]

May 18, 1945

Granning & Treece
S. E. 8th & Hawthorne Blvd.,
Portland 14, Oregon

Re: John W. Van Meter
Trinity Policy #906675
Franklin Fire Policy
#TR 8629

Gentlemen:

In response to your letter of May 4th we are pleased to enclose herewith loss payable endorsements for the above captioned policies reading to yourselves and/or assigns. We wish to advise you there is a balance still due us on these policies of \$138.61. In view of the fact that this balance is

long past due we are wondering if you could add this amount to your loan subject to Mr. Van Meter's approval.

We are sending a copy of this letter to him so that if it is possible for you to do we he will know what the situation is and no doubt be willing to sign a note for this amount. Will you please advise in this connection.

Very truly,

LIPMAN & ESFELD,

By MORTON PINCH.

MP:by

CC: to Mr. J. W. Van Meter. [44]

PLAINTIFF EXHIBIT 16

Would you please issue a second loss payable

Re: The Franklin Fire Ins. Co.

Policy #TR 8629

Mr. J. W. Van Meter

the unpaid balance and the installments are the same as the other one.

Bal. \$204.86

Writ Granning & Treece—can't not issue loss payable until his account is paid.

Cause 1563. Admitted Sep. 16, 1946. [45]

Telephone East 7114

State License No. M-108

Granning & Treece

Automobile Finance

Loans

Refinancing

S. E. Eighth and Hawthorne Boulevard

Portland—14,—Oregon

Since 1919

May 4, 1945

Lipman & Esfeld

General Insurance

Smith Tower

Seattle, Washington

Gentlemen:

Re: Trinity Universal

Policy No. #906675

J. W. Van Meter

The above described policy is in our possession and we have an unpaid balance on the truck de-

scribed therein of \$32,592.45, payable in 15 monthly installments.

In order that we may be fully protected, please issue a "Loss Payable Endorsement" as of April 18, 1945, showing our interests as described above. If possible, we would prefer this rider to read: "Loss Payable to Granning & Reece and/or Assigns."

Your cooperation in forwarding to us this form as early as possible will be appreciated.

Yours truly,

GRANNING & TREECE,
By J. R. MULLINS.

JRM/by

[46]

PLAINTIFF EXHIBIT 17

May 18, 1945

Granning & Treece
S. E. 8th & Hawthorne Blvd.
Portland 14, Oregon

Re: John W. Van Meter
Trinity Policy #906675
Franklin Fire Policy
#TR 8629

Gentlemen:

In response to your letter of May 4th, we are pleased to enclose herewith loss payable endorse-

ments for the above captioned policies reading to yourselves and/or assigns. We wish to advise you there is a balance still due us on these policies of \$138.61. In view of the fact that this balance is long past due we are wondering if you could add this amount to your loan subject to Mr. Van Meter's approval.

We are sending a copy of this letter to him so that if it is possible for you to do we he will know what the situation is and no doubt be willing to sign a note for this amount. Will you please advise in this connection.

Very truly,

LIPMAN & ESFELD,

By MORTON PINCH.

MP:by

C.C. to Mr. J. W. Van Meter

Cause 1563. Admitted Sep. 16, 1946. [47]

PLAINTIFF EXHIBIT 18

Telephone East 7114 State License No. M-108
Granning & Treece
Automobile Finance Loans Refinancing
S. E. Eighth and Hawthorne Boulevard
Portland—14,—Oregon
May 19, 1945

Lipman & Esfeld
General Insurance
205 Smith Tower
Seattle, Washington

RE: John W. Van Meter
Trinity Policy #906675
Franklin Fire Policy
#TR 8629

Gentlemen:

We thank you for the loss payable endorsements for the above described policies, received with your letter of May 18.

As to the balance due on these policies and the proposal that we add the amount to our loan subject to Mr. Van Meter's approval. We regret that it would not be possible for us to take such a step without Mr. Van Meter's advance approval.

We feel certain that he will take care of the matter direct now that it has been brought to his attention.

Yours very truly,
By J. R. MULLINS.

M

Cause 1563. Admitted Sep. 16, 1946. [48]

DEFENDANTS' EXHIBIT A-2

Telephone East 7114

State License No. M-108

Granning & Treece

Automobile Finance

Loans

Refinancing

S. E. Eighth and Hawthorne Boulevard

Portland—14,—Oregon

April 20, 1945

American Discount Company

Seattle, Washington

Re: J. W. Van Meter Account on

Logging Trucks, Trailers

and Various Equipment

Gentlemen:

In accordance with our recent telephone conversation, we are enclosing herewith a certified check of the Page and Page Company of this city in the amount of \$14,538.61, covering the balance in full on the above account as quoted by phone.

The reason this is not our check is because the matter was handled through the above dealer and therefore it was necessary to issue their check as our check was remitted to them for a larger amount.

You will note, however, that the enclosed authorization specifies that all papers, titles, notes, mortgages, insurance policies and other papers are to be forwarded direct to this office. We will appre-

ciate your prompt attention to the forwarding of these papers.

Very truly yours,

GRANNING & TREECE,
By J. D. M. TREECE.

JDMT emw

Defendants' Exhibit No. 2 for identification.
Deposition of Sol Esfeld, September 12, 1946.

EARL R. FIELD,
Notary Public.

Cause 1563. Admitted Sep. 16, 1946. [49]

B. B. Granning

J. D. M. Treece

Granning & Treece

Automobile Finance

Loans

Refinancing

Portland, Oregon

Main Office

East 8th and Hawthorne Ave.

Phone East 7114

Branch Office

185 East Broadway

Trinity 4491

American Discount Company

Seattle, Wash

Gentlemen:.

In accordance with the following authorization we are enclosing herewith our check to be applied on the account described below:

Your account No.

Amount of our check covering balance in
full \$14,538.61

Name: J. W. Van Meter,

Address: Wallowa, Oregon.

Logging trucks, trailer, Buick automobile
Car and other equipment Model.....

Motor No. Serial No.

Purchased from

Kindly forward all papers in connection with
this account direct to us.

Yours very truly,

GRANNING & TREECE,

American Discount Company,
Seattle, Washington

Gentlemen:

You are hereby authorized to accept payment of
my account in full from Granning & Treece and to
return the State Certificate of Title, notes or con-
tract, insurance policy and other papers direct to
them. If I am entitled to any refund for unearned
interest or insurance premium you may also return
that direct to Granning & Treece.

/s/ J. W. VAN METER.

Dated April 20, 1945. [50]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the plaintiffs and move the Court to set aside the judgment and dismissal entered herein on the 18th day of September, 1946, and to grant plaintiffs a new trial on the ground that:

1. There was error of law occurring at the trial.
2. The judgment is contrary to law.

Specifically, the plaintiffs contend that the Court erred in concluding:

1. That the decisions of the 9th Circuit Court of Appeals in the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, 99 F. (2) 333, 108 F. (2) 713, were controlling and could not be distinguished.
2. That the plaintiffs were negligent in failing to have gone back and asked to examine the policy, and were chargeable with notice of its provisions.
3. That the plaintiffs were not entitled to a reformation of the insurance policy, as prayed for, or were not entitled to recover on the theory of waiver or estoppel or election.

Submitted herewith is a memorandum brief in

which the [51] foregoing propositions are discussed in more detail.

JONES & BRONSON,
Attorneys for Plaintiffs.

Received Sept. 25, 1946. Clarke, Clarke & Albertson; by R. M. McClurg.

[Endorsed]: Filed Sept. 25, 1946. [52]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION FOR
NEW TRIAL

This matter having come on duly and regularly for hearing before the undersigned Judge of the above-entitled Court upon the 30th day of September, 1946, upon plaintiffs' motion for a new trial, and the Court having listened to arguments of counsel and being fully advised in the premises does hereby find that plaintiffs' motion is not well taken and should be overruled; now, therefore,

It Is Ordered, Adjudged and Decreed that plaintiffs' motion for new trial be and the same is hereby overruled.

Done in Open Court this 30th day of September, 1946.

HOWARD C. SPEAKMAN,
Judge.

Presented by:

GEORGE W. CLARKE,
Attorney for Defendant.

[Endorsed]: Filed Sept. 30, 1946. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that J. W. Van Meter, B. B. Granning and J. D. M. Treece, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment in this action on September 18, 1946.

Dated this 12th day of December, 1946.

JONES & BRONSON and
ALBERT OLSEN,
Attorneys for Appellants.

[Endorsed]: Filed Dec. 12, 1946. [54]

United States Circuit Court of Appeals
for the Ninth District

Dist. Ct. No. 1563

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Plaintiffs,
Appellants,

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation, MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants,
Appellees.

STATEMENT OF POINTS
TO BE RELIED UPON

The points upon which appellants intend to rely
on this appeal are as follows:

I.

The Court erred in denying plaintiffs' request
for jury trial and striking plaintiffs' demand for
jury trial.

II.

The Court erred in finding that the plaintiffs'
were not entitled to a reformation of the policy
as prayed for in the Complaint.

III.

The Court erred in finding that the plaintiffs' were not entitled to recover on the theory that the defendant, through its agents, had waived or was estopped to rely on that provision in the policy purporting to limit coverage to the State of Washington.

IV.

The Court erred in concluding that the decisions of the Ninth Circuit Court of Appeals in the case of *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2nd 333, 108 Fed. 2nd 713 were decisive of the issues in this case.

V.

The Court erred in dismissing the case at the close of [55] the plaintiffs' case on defendants' motion challenging the sufficiency of the evidence.

VI.

The Court erred in denying appellants motion for a new trial.

JONES & BRONSON,

Attorneys for Appellants.

Received Jan. 6, 1946. Clark, Clarke & Albertson; by R. M. McClurg.

[Endorsed]: Filed in the U.S.D.C. Jan. 8, 1947. Millard P. Thomas, Clerk; by Percy Maddux, Deputy. [56]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.
2. Order of Removal dated May 15, 1946.
3. Demurrer of Defendants, Abe Goldman and Morton Pinch.
4. Answer of Defendant, Franklin Fire Insurance Company.
5. Demand for Trial by Jury.
6. Motion to Strike Demand for Jury Trial.
7. Judgment of Dismissal As To Defendants, Abe Goldman and Morton Pinch, dated July 24, 1946.
8. Order Striking Jury Demand, July 24, 1946.
9. Transcript of Proceedings at Trial, two copies of which are filed herewith, omitting therefrom lines 19 to 25 inclusive on page 25, Pages 26 to 49 inclusive and lines 1 to 7 inclusive of page 50, being part of the testimony of J. W. Van Meter and lines 14 to 25 inclusive of page 95, pages 96 to 99 inclusive and lines one to 6 inclusive of page 100, being part of the testimony of Howard Cooper.
10. The attached narrative of that part of J. W. Van [57] Meter's testimony appearing between

line 19, page 25, and line 7 of page 50 of the transcript of proceedings.

11. The following exhibits, plaintiffs' exhibit numbers 1, 2, 3, 4, 5, 13, 14, 15, 16, 17 and 18. (A copy of Exhibit No. 1 is attached to the Complaint so reference thereto can be made without recopying it). Also, defendants' Exhibit A-2.

12. Judgment of Dismissal, September 18, 1946.

13. Motion for New Trial.

14. Order Overruling Motion for New Trial.

15. Notice of Appeal.

16. Statement of Points on which Appellants Intend to Rely.

17. This Designation.

JONES & BRONSON,

[Endorsed]: Filed in U.S.D.C. Jan. 8, 1947.
Millard P. Thomas, Clerk; by Percy Maddux,
Deputy. [58]

In the District Court of the United States
for the Western District of Washington,
Northern Division

No. 1563

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation; MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants.

ORDER AS TO ORIGINAL EXHIBITS

This cause coming on to be heard on the motion of the plaintiffs (appellants) that the original of Exhibit No. 1 used at the trial of this action be sent to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of a copy thereof and it appearing to the Court that such original exhibit should be inspected by the appellant court.

It Is Ordered that the Clerk of the Above Entitled Court forward to the United States Circuit Court of Appeals for the Ninth Circuit plaintiffs' exhibit No. 1.

Done in Open Court this 13 day of January, 1947.

LLOYD L. BLACK,
Judge.

Presented by Albert Olsen, one of Attys. for pls.

Approved. Clarke, Clarke & Albertson, atty. for
def. Franklin Fire Ins. Co.

[Endorsed]: Filed Jan. 13, 1947. [61]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
FILING RECORD

This matter coming on for hearing on the application of the plaintiffs (appellants) for an order of extending the time for filing the record, and it appearing that an extension of time is proper, and the Court being advised in the premises; now, therefore,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the Circuit Court of Appeals for the Ninth Circuit is extended until February 10, 1947.

Done in Open Court this 13 day of January, 1947.

LLOYD L. BLACK,
Judge.

Presented by Albert Olson, Atty for pls.

Approved. Clarke, Clarke & Albertson, attys. for
def. Franklin Fire Ins. Co.

[Endorsed]: Filed Jan. 13, 1947. [62]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby stipulated by and between the parties hereto through their respective attorneys of record, undersigned, that the Clerk of the above entitled Court may prepare and forward to the United States Circuit Court of Appeals for the Ninth District a supplemental transcript of the record on appeal containing the following:

- (1) Petition for removal
- (2) Bond of removal
- (3) Transcript of proceedings at trial
- (4) Order extending time for filing record
and docketing appeal
- (5) Order as to original exhibits
- (6) This stipulation

Dated this 13 day of January, 1947.

JONES & BRONSON,
Attorneys for Plaintiffs.
CLARKE, CLARKE &
ALBERTSON,
Attorneys for Defendant,
Franklin Fire Insurance
Company.

[Endorsed]: Filed Jan. 13, 1947. [63]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I. Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 63, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designations of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with Reporter's Transcript of Testimony, the original of which is transmitted herewith as

part of the record on appeal, constitute the record on appeal herein from the judgment of dismissal, dated September 18, 1946, of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Title 28, U.S.C. Supp. IV, Sec. 555) for making record:

60 pages at 10c (copies furnished).	\$ 6.00
1 pages at 40c40
Notice of Appeal	5.00

Total\$11.40

I further certify that the foregoing amount of \$11.40 has been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 30th day of January, 1947.

[Seal]

MILLARD P. THOMAS,

Clerk,

By /s/ PERCY MADDUX,

Deputy. [65]

In the District Court of the United States for
the Western District of Washington,
Northern Division

No. 1563

J. W. VAN METER, et al.,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE CO.,

Defendant.

Before: The Honorable Howard C. Speakman,
Judge.

September 16, 1946, 10:00 a.m.

Appearances:

Albert Olsen, Esq., and Story Birdseye, appearing for the Plaintiffs.

George W. Clarke, Esq., appearing for the Defendant.

Whereupon, the following proceedings were [1*]
had:

* Page numbering appearing at foot of page of original certified Transcript of Record.

PROCEEDINGS

(Opening Statement delivered on behalf of the Plaintiff.)

Mr. Olsen: I would like to call Mr. Van Meter.

J. W. VAN METER

a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

The Court: I take it, Mr. Olsen, that practically everything is admitted in the Answer except the question of agency and loss?

Mr. Olsen: That is about it.

The Court: They admit the issuing of the policy, and the fire and the proof of loss and all of those things—the ownership in the plaintiff?

Mr. Olsen: Yes.

The Court: They admit the American Discount Company and Lipman and Esfeld occupied the same offices; and they admit that they were the agents of the company as they allege, having only the power existing under the statute of the State of Washington, by virtue of such license. [2]

Mr. Olsen: Yes.

The Court: And they say that the American Discount Company requested the policy.

Mr. Olsen: Yes.

The Court: So we can avoid the loss of a lot of time by introduction of the policy in evidence.

Mr. Olsen: That is what I was going to do. Will you mark it for identification?

(Testimony of J. W. Van Meter.)

(Policy of Insurance marked as Plaintiffs' Exhibit No. 1 for identification.)

(Loss Payable Clause marked as Plaintiffs' Exhibit No. 2 for identification.)

The Court: Let both be received.

(Plaintiffs' Exhibit No. 1 received in evidence.)

(Plaintiffs' Exhibit No. 2 received in evidence.)

[Plaintiffs' Exhibit No. 2 set out on page 46.]

Direct Examination

By Mr. Olsen:

Q. Will you state your name?

A. John Van Meter.

Q. You are one of the plaintiffs in this action, are you? A. Yes. [3]

Q. What is your business, Mr. Van Meter?

A. Logging and trucking.

Q. How long have you been engaged in that business? A. Since 1932.

Q. When did your dealings with the American Discount Company and Lipman and Esfeld first commence?

A. About five years ago, somewhere in that neighborhood.

Q. What was the nature of those dealings?

A. Financing trucking equipment or machinery, borrowing money to either finance or purchase equipment.

(Testimony of J. W. Van Meter.)

Q. What person did you deal principally with in your dealings with those two concerns?

A. Mr. Esfeld—Sol Esfeld, that.

Q. Where is the place of business of those two businesses? A. Smith Tower, Seattle.

Q. What floor? A. Second floor.

Q. Can you describe the entrance and the office space occupied by those two concerns?

A. Yes, they all occupy one large room.

Q. What names do they have on the door?

A. I believe it is "American Discount Company" "Lipman and Esfeld."

Q. Say prior to April, 1944, had you received a policy issued by Lipman and Esfeld, signed by Sol Esfeld? [4]

A. Had I received a policy?

Q. Yes.

A. At different time I believe I have.

Q. What was your understanding as to Sol Esfeld's interest in Lipman and Esfeld?

A. I supposed that he was the owner or one of the partners.

Q. Do you know where Mr. Esfeld's desk is in the American Discount Company or Lipman and Esfeld's office? A. Yes.

Q. Does Abe Goldman have a desk right nearby?

A. Yes, he does.

Q. How far away?

A. About four or five feet.

Q. Do you know where Mr. Pinch's desk is?

(Testimony of J. W. Van Meter.)

A. It is across the room, in the other part of the lobby.

Q. Going into their office, do you have any means of knowing whether or not, when you go to the desk you are talking with a representative of Lipman and Esfeld or American Discount Company.

Mr. Clarke: Objected to as calling for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Olsen) Is there any sign or indication present there to direct you as to whether or not Lipman and [5] Esfeld occupy any particular part of the space, and the American Discount Company some other particular part of the space?

A. No.

Q. What developed in early November, 1944, to cause you to go to their office?

A. I wanted to buy machinery. That was at the time I bought this tractor and arch, and wanted to get the money to finance it with.

Q. Did you consummate arrangements to finance you in the purchase of this International Harvester tractor? A. That is right; they did.

Q. Do you recall how much additional money was advanced at that time for that purpose?

A. I think I paid somewhere in the neighborhood of \$4,000.00 out of my pocket and borrowed the balance from them.

Q. Was it customary in your dealings with them for them to ask for insurance?

(Testimony of J. W. Van Meter.)

A. They generally always wrote the insurance themselves.

Q. At that time, as near as you can recall, tell the Court what was said about insurance on this equipment?

A. Well, Sol Esfeld and I sat down at the desk and the insurance was drawn. He asked me what I wanted in insurance and I told him the worst risk on tractors [6] that were used in the woods was either moving—damage to the tractor by dumping it off of a truck while you were moving it or a tree falling on it or a forest fire; that nobody would steal it, and if it was covered with those three hazards, why, I would be satisfied. That was definitely understood right there. I had also done most of the business with Esfeld and never had had any reason to question it before.

Q. Speak so that the reporter and Judge can both hear.

A. I borrowed the money and signed the contract. He said that the insurance would be made up and a copy would be mailed to me.

Q. Was it explained to you then or sometime prior to that time by Mr. Esfeld as to the types of policies they customarily issue with respect to different classes of equipment? A. Yes.

Q. Could you explain what those types were with reference to the particular type of equipment?

A. Well, on this particular tractor, there were two policies as I remember it, the Marine policy is a policy that is supposed to be good any place in

(Testimony of J. W. Van Meter.)

any State. Because that was the policy I wanted on this, I wasn't interested in what the other one was. [7] Possibly it demanded a smaller premium.

Q. Do they issue a different type of policy covering trucks and trailers, that is, equipment which moves about?

A. Yes. There is a short-rate policy, if your truck is hauling logs within a 25 or 50-mile radius you can get a policy with a lot less premium than one which is good any place in the State.

Q. But it wasn't that type of insurance which you were going to have on your tractor?

A. No.

Mr. Clarke: Objected to as leading.

The Court: Sustained. Go ahead.

Q. (By Mr. Olsen) Was another type of policy to be issued with reference to the tractor equipment? A. Yes.

Q. What type of insurance was that to be?

A. That was a Marine policy that was supposed to be good any place.

Q. During the course of your dealings with the American Discount Company and Lipman and Esfeld, at what different places had you logged?

A. I was logging in Skagit County; that is up north, up near Bellingham, when I first started doing business with [8] them. I had logged at Aberdeen and Hoquiam down on the harbor for about six months, and about two years at Morton and Randall, Washington and Lewis County; about six

(Testimony of J. W. Van Meter.)

months out here at Enumclaw which is in King County. Then I operated trucks in Olympia for some time, logging trucks; that is, maybe for a year and at the time I would have three of my trucks working in one part of the State and three of them in another part of the State on different jobs.

Q. The firms of Lipman and Esfeld and American Discount Company, did they know of your having done business in different parts of the State?

A. Yes.

Mr. Clarke: Objected to as calling for a conclusion.

The Court: Sustained.

Q. (By Mr. Olsen) After you had been in there about November 10, 1944, in the office of Lipman and Esfeld, did you receive any advice about the issuance of insurance covering this equipment?

A. No.

Q. But you understood that it had been issued?

A. Yes.

Q. Did you ever see the policy? [9]

A. Never.

Q. That is, up to the time of the fire?

A. No. The first time I ever saw the policy was about two weeks after the fire.

Q. Did you have occasion to have some further discussions with Mr. Esfeld and the—relative to the move down to Oregon some time in March or say April, 1945? A. Yes.

Q. Were you at their office? A. I was.

(Testimony of J. W. Van Meter.)

Q. More than once during that period?

A. Yes.

Q. How many times?

A. I was there at least two or three times, and then on up to—they generally referred me to Pete Thomas. That is a fellow that I believe has something to do with the American Discount Company. Most of my business with them was approved by Thomas.

Q. And also by Mr. Esfeld?

A. That is right.

Q. Can you identify the approximate time of those visits?

A. Well, it was during the late fall before I had bought this "TD-18 tractor," and again in the early spring after I bought the other tractor. I had seen them a number of times about financing this other equipment [10] for me when I moved to Oregon.

Q. When do you recall you first brought up the subject of your moving to Oregon?

A. Sometime in August.

Q. Of what year?

A. '45. You see, I had a certificate from Washington, D. C., to buy a new truck, and that truck and trailer was going to cost me about \$11,000. There were a lot of other fellows who would want that same truck that had certificates and I had to get the money to buy it. I made a payment on the truck to hold it with the intentions of buying it later. I saw this outfit several times to get the money.

(Testimony of J. W. Van Meter.)

The Court: What do you mean you had to have the certificate?

The Witness: During the war we had to have a Certificate of Necessity.

Q. (By Mr. Olsen) When did you say your first discussions were with these two firms, relative to moving down to Oregon?

Mr. Clarke: Objected to "as to the two firms." I don't recall that you said "two firms."

Q. (By Mr. Olsen) When do you recall were your first discussions [11] with Sol Esfeld relative to moving down to Oregon?

A. Well, it was sometime—possibly a month or six weeks before they financed this "TD-18" tractor.

Q. In other words, as early as October, 1944?

A. Yes.

Q. Then you had discussed with Mr. Esfeld the prospect of moving down into Oregon, even before you obtained this tractor?

Mr. Clarke: Objected to as leading.

The Court: Sustained.

Q. (By Mr. Olsen) Did you have occasion to visit their office sometime in March, 1945?

A. Yes.

Q. What was the occasion for that visit?

A. That was to borrow money to buy this new truck with.

Q. What new truck?

A. I was getting a new Mack truck. That was the one that I had the money paid on and the cer-

(Testimony of J. W. Van Meter.)

tificate for; and to see if they wouldn't re-finance my contract and buy that additional equipment so that I could take this job in Wallowa, Oregon. I had a nice job over there.

Q. Did you tell them that you had a job to log in Wallowa, Oregon? [12]

A. I did.

Q. Did you have more than one discussion with them about that additional financing in March, 1945?

A. Yes.

Q. What was the result of those discussions with reference to their making the additional loan?

A. Well, they didn't like to do it because I would be out of the State—and so far out of the State. Wallowa is quite a long ways away. They suggested that I try to get it re-financed in Oregon some place if I was going to leave the State.

Q. What did you do then about getting finances some place else?

A. I went to Portland, and in two or three days I was able to borrow the money?

Q. Did you then move your equipment down in Oregon?

A. I did.

Q. Approximately when?

A. Sometime in May, we moved it over there by truck. I remember it rained.

Q. Are you sure it was in May?

A. It was the last of April or the first of May, sometime along in there.

Q. Do you remember when your loan with the American Discount was paid off? [13]

(Testimony of J. W. Van Meter.)

A. I was just a few days before we moved.

Q. It was just a few days before you moved?

A. Yes. You see I wouldn't move the equipment out of the State until this finance company was satisfied up here.

Q. So if the evidence shows that they were paid off about April 20, then you would say what as to the time of your moving?

A. Between April 20, and the 10th of May would cover it easy enough. We were several days getting over there.

Q. In any of those times during March and April that you were in the office of the American Discount Company, and Lipman and Esfeld, did you have occasion to talk with Morton Pinch or Abe Goldman? A. Yes.

Q. Had you become fairly well acquainted with them? A. Yes.

Q. You became fairly well acquainted with them about this time in the sense that you could recognize them? A. Yes.

Q. And they knew you, did they?

A. Yes.

Q. Did you have any discussions with either of those men?

A. One of them tried to sell me a life insurance policy and wrote me about it afterwards. [14]

Q. Do you recall approximately when that discussion with one of them was about life insurance?

A. It was sometime in March. I am sure it was in March.

(Testimony of J. W. Van Meter.)

Q. Did you have a rather extensive——

Mr. Clarke: Objected to as immaterial. Excuse me. Go ahead and finish your question.

Q. (By Mr. Olsen) Did you have an extensive conversation with him at any time?

A. Well, I explained to him——

Mr. Clarke: I will object to that as immaterial as far as any issues of this case are concerned.

Mr. Olsen: If your Honor please, Mr. Goldman is one of the partners of Lipman and Esfeld. Any discussion between them at about that time is material, I think.

Mr. Clarke: It is about life insurance as I understood the question and answer.

The Court: Was there anything in the discussion about this insurance on this equipment or was it all about life insurance?

The Witness: We talked there for about a half an hour. I was explaining to him about my job in Oregon, and that I expected to make some money. Then he suggested that I buy some more life insurance, [15] not knowing that I already had a policy up here with Northern Life that was all I could afford. Out of courtesy to them I was letting him go ahead and explain the thing to me. He figured out a set of papers in case I wanted to buy some life insurance. I was very much enthused about this job in Oregon. When you tell them fellows that you are going to make some money they are going to sell you some insurance if they can, you see.

(Testimony of J. W. Van Meter.)

Mr. Clarke: I move that the answer be stricken as immaterial and not bearing upon the issues.

Mr. Olsen: If your Honor please, I want to bring out the fact that members of the firm knew he was going down to Oregon. I think it is material in that respect.

The Court: The answer may stand.

Q. (By Mr. Olsen) During this time in March and April, 1945, what was your understanding as to who were the owners of Lipman and Esfeld?

Mr. Clarke: Objected to as calling for a conclusion as to what his understanding was.

The Court: Sustained.

Q. (By Mr. Olsen) You knew, did you, that Mr. Esfeld had [16] been a partner or owner of Lipman and Esfeld prior to that time, did you not?

A. I did.

Q. Had you been informed or received any information to indicate to you that there had been any change in that status? A. No.

Q. Did you receive a letter from Lipman and Esfeld sometime in May, 1945, after you moved down there?

A. Sometime the first week in May I received correspondence from them at Wallowa. I wrote them from Wallowa.

(Correspondence marked as Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Olsen) I ask you if that is a letter that you received in the mail? A. Yes.

Q. With the attachments also received?

(Testimony of J. W. Van Meter.)

A. Yes.

Mr. Olsen: I offer them in evidence.

Mr. Clarke: For the purpose of the record, I object to the introduction of the exhibit or any part thereof on the ground that they are utterly immaterial to the issues in that particularly that an insurance contract may not be extended to cover [17] in a different locality by the doctrine of waiver or estoppel.

The Court: What is the purpose of that offer?

Mr. Olsen: If your Honor please, I will connect it up later with some correspondence from Granning & Treece. It is to show that they had—for one thing, of course, there is a specific reference there—this statement of account here which accompanies this letter, includes a statement of the premium on this policy. At that time apparently the premium was unpaid and I will show that they had knowledge he moved down to Portland; and that they with the knowledge of the fact of his moving down there were billing him and asking him to pay the premium on it. I think it connects up with some later correspondence that will be offered.

Mr. Clarke: I think a further observation, if your Honor please, that there is no contention that the premium charged was otherwise than the premium for the original coverage which was restricted to the State of Washington.

The Court: I will reserve ruling on that until we see the other correspondence in that connection.

(Testimony of J. W. Van Meter.)

Q. (By Mr. Olsen) Did you make a reply to this letter? [18] A. Yes, I think so.

Q. Did you keep a copy of your reply?

A. No.

Q. Do you recall what the substance of your reply was?

A. When they billed me for this money, and I had just moved to Oregon—I was short of money, and I told them that if I owed the balance, that they would get the money in a short time probably.

Mr. Clarke: We have the letter to which counsel is referring. I think it would be better procedure, rather than to have oral recollection—that we produced the letter.

(Letter marked as Plaintiff's Exhibit 4 for identification.)

Q. (By Mr. Olsen) I will ask you if this the letter than you wrote in reply to that?

A. Yes.

Q. That is Plaintiff's Exhibit 4?

A. Yes.

Mr. Olsen: I offer that in evidence.

Mr. Clarke: The same objection as to the other exhibit.

Mr. Olsen: That is a letter addressed to them in which he says he had had considerable expense in moving down here. It is to show that they had specific [19] knowledge that he was in Oregon at the time and that he had moved his quipmnt there.

The Court: Exhibits 3 and 4 may be received.

(Testimony of J. W. Van Meter.)

(Plaintiffs' Exhibit 3 received in evidence.)

[Plaintiffs' Exhibit 3 set out on pages 47 to 50.]

(Plaintiff's Exhibit 4 received in evidence.)

[Plaintiffs' Exhibit 4 set out on pages 50-51.]

Q. (By Mr. Olsen) I will ask you whether you heard again from Lipman and Esfeld later on—by correspondence, I mean.

A. Later than May?

Q. Yes.

A. I can't say.

(Letter marked as Plaintiffs' Exhibit No. 5 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiff's Exhibit 5, purporting to be a letter dated August 17, 1945, from Lipman & Esfeld, and ask you if you received that letter in the mail?

A. Yes. I received this letter, yes.

Q. You will note the first paragraph says, "This is in response to your letter of August 10." Does that refresh your recollection as to whether or not you wrote them on August 10? [20]

A. Yes. It was in August that we almost had a forest fire at Wallowa, Oregon. The fire warden got us up, me and my crew up all night fighting fire. The next day my wife and I had some discussion about our insurance. I believe I wrote to Seattle making some inquiries about it but I don't remember and I don't have any copy of my own letter.

Mr. Olsen: I offer this in evidence.

(Testimony of J. W. Van Meter.)

The Court: When was the re—in October?

The Witness: In October—the one in California. We almost had a fire in Oregon before we moved to California.

Mr. Clark: The same objection as to the offer and to the effect, further than these are all immaterial in that they have to do—not with the original issuance of the policy—but with the situation which developed later; also that that letter had to do apparently with other policies.

The Court: It may be received.

(Plaintiffs' Exhibit 5 received in evidence.)

[Plaintiffs' Exhibit 5 set out on pages 51 to 53.]

Q. (By Mr. Olsen) Did you later have occasion to move your equipment down to Redding, California? A. Yes.

Q. Approximately when did you move your equipment down there? [21]

A. In September, around the 1st of September.

Q. Did you have a fire affecting this equipment?

A. Yes.

Q. Will you relate to the Court the circumstances of the fire?

A. It was in October; the morning of October 4, we went to work at 4:00 o'clock in the morning. The woods were on fire and the spar tree. The tractor was already destroyed and a truck and trailer belonging to a fellow that was hauling for me that was left in the woods the night before was completely destroyed. There were about 150 forest

(Testimony of J. W. Van Meter.)

service men with bumper wagons and the company's crew were there fighting the fire.

Q. Where was your tractor, this International Harvester tractor situated at the time—that night, that is?

A. It was about two hundred or three hundred feet from our spar tree where we had loaded logs on trucks.

Q. Was it near brush or logs?

A. Yes. The day before a brake lever that controls the truck broke. That is how come we left it in the brush. We had to turn the logs behind it.

Q. And the fire occurred on the night of what?

A. The night of October 3rd—around midnight the Forest [22] Service told us they could see it from their towers. It was about two hours later they got there to fight it with their equipment.

Q. Can you describe the condition of the tractor after the fire?

A. It was badly burned. We believed that all of the oil cells were gone in it. Everything exterior was completely burned away, that is, the fuel pump and the magneto and batteries and seats. You see, just before we stopped the tractor we had filled the Diesel tank. It holds about sixty gallons of Diesel. When the bulb on the side of the tractor broke, all of that Diesel oil ran down and fed the flames. There was about four or five inches of pine needles, so it was setting in a bed of coals. The iron was hot like a stove-top. It would just sizzle. There was reason to believe that the temper had gone out of

(Testimony of J. W. Van Meter.)

a lot of the parts of the machine. It was a sorry looking mess. And all of the rigging behind it was completely burned. There was no hope for recovery on any of that.

Q. What was the appearance after the fire as to whether or not it had been just a mild fire or an extremely hot fire as far as it applied to this tractor?

Mr. Clarke: Objected to as having already been [23] answered.

The Court: Go ahead and answer it.

A. I would say that it looked extremely bad for the tractor because the truck had burned 60 feet away and was melted right to the ground. The flame was laying right in the ground. They were both in the same fire.

Q. What has been your experience particularly with reference to buying and selling of tractors of this type and ascertaining their value?

A. Well, I have owned a number of tractors myself. In the seven or eight years that I have been in the woods I have hauled lots of tractors and seen the deals made on lots of them, both new and used.

Q. Are you familiar with the OPA ceiling price on a tractor of this type? A. Yes.

Q. What was the OPA ceiling price on a tractor of this type at the time of the fire?

A. \$8850.00.

Q. Is that a used tractor? A. Yes.

Q. What would you say as to the condition of this tractor just before the fire?

(Testimony of J. W. Van Meter.)

A. It was in good condition. I had just taken it out of [24] the shop. I had spent \$600 on it and it was working perfectly. I had had some things overhauled on it and I had worked it three days when it burned up.

Q. Have you been able to form an opinion as to its probable salvage value after the fire?

A. Yes. If I had received an offer of around \$3500 I would probably have taken it for the salvage.

Mr. Clarke: I object to what he would have accepted as improper. It is a question of what the value was. I move that the answer be stricken.

The Court: It may be stricken.

Q. (By Mr. Olsen): What was your opinion as to the value of the tractor after the fire?

A. \$3500 or \$4000, in that neighborhood.

Q. On what do you base your opinion in that respect?

A. On the value of it after it would have been repaired and what it would have cost to repair it.

**NARRATIVE OF PART OF J. W. VAN
METER'S TESTIMONY APPEARING AT
PAGES 25 THROUGH 50, LINE 7**

"I started to repair the tractor in March following the fire. Plaintiffs' Exhibit 7 is a list of parts and labor furnished by J. G. Bastain of Redding, California, in the repair of the tractor. I paid the amount of this bill namely, \$2,652.68. Plaintiffs'

(Testimony of J. W. Van Meter.)

Exhibit 8 is a statement of Bastain Equipment Company of charges for bringing the tractor in from the woods where it was destroyed and dismantling the tractor to determine the amount of the damage. I paid the total of the items shown on Plaintiffs' Exhibit 8 in the sum of \$340.93 to J. G. Bastain. Plaintiffs' Exhibit 9 is a bill of goods from Howard Cooper Corporation of some parts for Isaacson bulldozer that I had on hand before the tractor burned up and these items went into its reconstruction at Bastain's. (Items listed in Exhibit 9 total \$40.52). I also had a crankshaft on hand before the fire which cost \$158.00 which Bastain installed in the machine. Plaintiffs' Exhibit 11 is a bill of goods installed in the tractor and parts, \$333.25, and the labor was \$155.19 making a total of \$488.44. That was parts that were damaged by fire and that had to be installed in the tractor before it could be used. That is in addition to the larger bill [59] of about \$2,600.00. The work listed in Plaintiffs' Exhibit 11 was work performed after I took it out of Bastain's hands. This work was necessary to put it in working condition. I paid this bill in the total sum of \$488.44. I helped Bastain and Company in making the repairs and in obtaining parts. One fellow employed by me and myself—we worked two weeks, Saturday and Sundays, in rebuilding the tractor. I made telephone calls and a trip to Eugene and Portland. I got a list. Telephone calls and the trip to Eugene

(Testimony of J. W. Van Meter.)

and Portland and the wages I paid to this helper, before we got the cat, and myself, and the expenses for that two-week period that we spent in Redding. \$869.50 is the total of the whole thing.” [60]

Q. (By Mr. Olsen) After the losses occurred I understand you to say that you contacted Lipman & Esfeld?

A. Yes.

Q. What did they tell you?

Mr. Clarke: I object to that until it is determined whether this was orally or in writing.

Q. (By Mr. Olsen) How did you contact them?

A. Telephone.

Q. Who did you contact?

A. I talked to Mr. Pinch.

Q. What did they tell you?

A. To have Alherne of the Fire Adjustment Bureau in California make the adjustment of the fire immediately they would send a written confirmation of that order.

Q. Did he tell you that or was that told to you by someone talking from the branch office of the Franklin Fire [50] Insurance Company here in Seattle?

A. That could have been. I have made calls to both companies—several of them, and telegrams (Telegram marked Plaintiffs’ Exhibit 13 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs’ Exhibit 13, and ask you what that is.

A. This is a telegram that I received from Lipman & Esfeld right after the fire.

(Testimony of J. W. Van Meter.)

Mr. Olsen: I offer this in evidence.

Mr. Clarke: Objected to as being irrelevant, incompetent, and immaterial and not bearing upon the issues. The fact that the company may have assigned an adjuster to ascertain the facts as to the extent of his loss does not in any way affect the coverage of the policy.

Mr. Olsen: It is designed to show, Your Honor, of course, that the agent who wrote this policy—the idea of this being limited to any particular territory, it never occurred to them. And even at that late date they raised no issue about it.

Mr. Clarke: Even if it should appear, if Your Honor please, that they had overlooked the policy limitation, that fact would not operate to extend the coverage of the policy down to a loss in California. [51]

The Court: It may be received.

(Plaintiffs' Exhibit 13 received in evidence.)

[Plaintiffs' Exhibit 13 set out on page 53.]

(Copy of letter dated October 30, 1945, marked as Plaintiffs' Exhibit 14 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs' Exhibit 14 and ask you to state what that is?

A. This is a copy of a telegram from Lipman & Esfeld to Granning and Treece.

Q. You don't mean a telegram, do you?

A. No, a letter.

Q. Is that a copy you received in the mail?

A. Oh, yes.

(Testimony of J. W. Van Meter.)

Q. Signed by Morton Pinch, Lipman & Esfeld?

A. Yes.

Mr. Olsen: I offer that in evidence.

Mr. Clarke: The same objection as to the last exhibit.

Mr. Olsen: The policy referred to there, Your Honor, is this policy.

The Court: This is dated October 30. Was that before or after the fire?

The Witness: After the fire. It expired [52] after the fire.

Mr. Clarke: Are you referring now to the date of the letter or the date of the expiration of the policy?

The Witness: The expiration of the policy was after the fire. And of course the letter notifying me of it was before.

The Court: It may be received.

(Plaintiffs' Exhibit 14 received in evidence.)

[Plaintiffs' Exhibit 14 set out on page 54.]

(Copy of letter marked as Plaintiffs' Exhibit 15 for identification.)

Q. (By Mr. Olsen) Calling your attention again to Plaintiffs' Exhibit 4, I will ask you: Did you receive a reply to that letter or a letter in response to that one?

A. Yes, I believe I did; yes.

Q. Have you been able to locate that letter that you received in reply?

A. I don't think so.

(Testimony of J. W. Van Meter.)

Q. You have searched your files for it?

A. Yes.

Q. And you have not been able to locate it?

A. No.

Q. I hand you Plaintiffs' Exhibit 15 and ask you to look [53] that over and state whether or not that is a correct copy of the letter you received in reply?

A. Yes, it is quite evident that this is the reply.

Q. Was the copy of that letter that is attached to it along with it? A. Yes.

Q. This is going back a little bit to some previous testimony, Your Honor. A. Yes.

Mr. Olsen: I offer Plaintiffs' 15 in evidence.

Mr. Clarke: The same objection, that is, that it is not material to the issues and is irrelevant.

Mr. Olsen: That, Your Honor, is a reply to a letter you saw a minute ago. It is not connected up with the present testimony but relates to his previous testimony.

The Court: It may be received.

(Plaintiffs' Exhibit 15 received in evidence.)

[Plaintiffs' Exhibit 15 set out on pages 55 to 57.]

Q. (By Mr. Olsen) I have asked this before but I want to ask it again: Did you at any time prior to this loss on October 4, know of anything relative to the change in the status of the ownership of Lipman & Esfeld? A. No. [54]

Q. State whether or not you understood that Mr. Sol Esfeld still represented Lipman & Esfeld?

(Testimony of J. W. Van Meter.)

A. I supposed that he did.

Mr. Clarke: Objected to as a conclusion so far as his understanding was concerned.

The Court: Sustained.

Q. (By Mr. Olsen) Did you ever have this policy on which the suit is brought in your possession or did you ever see it prior to the time of the fire?

Mr. Clarke: I object to that as being immaterial in that the law says it is his duty.

The Court: Whether or not he ever saw the policy?

Mr. Olsen: Yes.

The Court: Overruled.

A. I never saw it until about two weeks after the cat was burned up, no, sir.

Q. (By Mr. Olsen) That was because it was in the hands of the American Discount Company first and then Granning & Treece later?

A. That is right.

Mr. Olsen: I think that is all. [55]

Cross Examination

By Mr. Clarke:

Q. Mr. Van Meter, at the time you arranged this financing with the American Discount, shortly prior to the time of the issuance of this policy, how many pieces of equipment were involved in the re-financing?

(Testimony of J. W. Van Meter.)

A. I consolidated—or rather all of the equipment that I had was consolidated into one contract.

Q. How many pieces would that be, roughly?

A. That would be two logging trucks and two trailers and an automobile and two tractors and a logging donkey and a 10-yard scraper bug, and a lot of miscellaneous tools and rigging.

Q. That was all mortgaged at the time then to the American Discount Company? A. Yes.

Q. You had some policies of insurance covering some of this equipment at the time?

A. Yes, I did have; and they were issued by Lipman & Esfeld.

Q. Those policies were also in the possession of the American Discount Company, were they not?

A. I don't believe that all of them were, no. At times I have had policies or a copy.

Q. In so far as the original policy is concerned, though, [56] did not the American Discount Company hold all of those policies?

A. Not always.

Q. At the time you did this re-financing, did you not deliver to them certain policies? A. No.

Q. Did they then have in their possession certain policies covering other of this equipment?

A. I believe they did; I believe so.

Q. You knew when this Franklin policy was issued it was to be sent to the American Discount Company, did you not?

A. I supposed that I would get a copy of it.

(Testimony of J. W. Van Meter.)

Q. You knew, did you not, however, that the original policy would be kept by the American Discount?

A. I knew that they would keep a copy for their own protection, sure; but I expected to receive a copy for our files.

Q. Did you not receive one? A. No.

Q. Did you ever ask for one?

A. I guess it never occurred to me because I went over the provisions for the insurance and the need for having it never occurred to me.

Q. This equipment,—what do you call this particular piece [57] of equipment that was involved in the fire down in California?

A. A “TD-18” International Tractor with an Isaacson dozer and a Carco winch.

The Court: What is that please?

The Witness: A TD-18. That is the biggest International tractor built. It is equipped with an Isaacson bulldozer and a Carco logging jamb on the back.

Q. (By Mr. Clarke) When did you acquire this equipment?

A. I bought it from the M. P. Mutter Construction Company of Seattle, and took it off of a dock over here in Seattle, and financed it with the American Discount and insured it all the same day and loaded it on the truck and left town. Sol Esfeld sent a fellow out to examine it, to check its value.

Q. Was it new or used equipment?

A. Used.

(Testimony of J. W. Van Meter.)

Q. What did you pay for it?

A. \$8850.00 for the tractor with a dozer and the drum and an additional \$2000 for a 8-yard Isaacson scraper bug.

Q. Did you know where the equipment had been used prior to the time you got it? [58]

A. Yes.

Q. Where had it been used?

A. In Alaska.

Q. Do you know whether or not it had been used on this Alcan Highway?

A. No, it was used on an airstrip; at least that is what was told me.

Q. Do you know in what part of Alaska?

A. No, I can't say for sure. They bladed an airstrip down was all. It hasn't seen any hard use.

Q. I will hand you Plaintiffs' Exhibit 7 which is the repair bill from Bastain and I will ask you whether or not that bill did not include a complete mechanical overhaul of the equipment?

A. No, because some of the parts that I furnished are not on here. If they were, then it would be complete.

Q. I think you missed the point of my question. You had been using this equipment for some period of time in connection with your logging operations?

A. Yes.

Q. Is it not correct that certain of these parts had been worn so that it was necessary to do some work on it to put it back in mechanical condition?

(Testimony of J. W. Van Meter.)

A. Do you mean weren't there some parts on here which were not damaged by fire which were involved in the [59] tractor, is that what you mean?

Q. Was there mechanical work done here which was not necessarily by reason of the fire?

A. Yes.

Q. Will you certify as to that? A. Yes.

Q. You have gone over each one of these items carefully and are prepared to testify that none of these items on here would have been necessary had it not been for the fire?

A. No, none of them. The tractor was working perfectly when it burned up and we would have run it some time. Of course, machines are subject to a breakdown. You can have a brand new tractor and break it down the first day, you know.

Q. How would a crankshaft become damaged by fire?

A. It could get too hot. The fact is—and his mechanics fixed the crankshaft and they believed—because the bearings were burned up and everything else in it, they believed it would be foolish to put new bearings around the old crankshaft and because I had one on hand, to do a complete job we put it in.

Q. This bill also included putting on a new set of caterpillar tracks, did it not?

A. No, it did not include any new tracks. I took delivery [60] of the tractor with the old tracks.

Q. What is the item on page 7?

A. That is probably a set of used rails that I bought as extras for \$100. That is \$100 for one set of used track rail.

(Testimony of J. W. Van Meter.)

Q. How would that have been made necessary by the fire?

A. No, that isn't. If that is in that total it certainly is an oversight. Because that one item is——

The Court: How much is that item?

The Witness: That is \$100.00.

The Court: That was not caused by the fire.

The Witness: No. That is a set of extra rails.

The Court: All right.

Q. (By Mr. Clarke) Did I understand you to testify on direct examination that had you started this repair work promptly after the fire that it could have been accomplished much more easily?

A. That is my opinion and that is J. G. Bastain's opinion. In fact, we are all agreed that because of the delay it took longer because those strikes came on afterwards.

Q. How much additional cost do you estimate was caused by the fact that the repairs were delayed?

Mr. Olsen: There is nothing to indicate that there would be any additional cost by reason of the [61] delay. He just pointed out that there was more delay by reason of the intermediate delay.

Mr. Clarke: I understood him to answer differently. I think the question is well taken.

The Court: I didn't understand you.

Mr. Clarke: I submit the question is well taken. I understood him to state that there was an increased cost and I wanted to know what it was.

(Testimony of J. W. Van Meter.)

The Court: Is that a fact that there was increased cost by reason of the delay?

The Witness: The way this thing affected me it increased it immeasurably because this particular machine tied up everything else that I owned.

The Court: He is speaking of increased costs of repair though, are you not?

Mr. Clarke: That is correct.

The Court: Was that increased by reason of the delay?

The Witness: I don't imagine that that was increased a great deal by reason of the delay itself. There was some but I don't just know what that would amount to.

Q. (By Mr. Clarke) Did the delay also make it necessary for you to go to considerable more expense in running [62] around to line these parts up?

A. Yes. Because at one time right after the fire, when Bastain prepared the original list of parts he had practically the whole thing in his shop at that time. Later he sold out most of those parts and wasn't able to replace them due to the strike.

Q. So that this extra expense incurred by yourself and your employee and going to Portland, and other places, amounting to approximately \$800 was principally made necessary by the fact that the repairs were not started promptly after the fire?

Mr. Olsen: I object to that on the ground it assumes something that was not testified to. This extra expense of going to Portland did not amount to

(Testimony of J. W. Van Meter.)

\$800. The expense of going to Portland amounted to several items running a little bit over \$100.00.

Mr. Clarke: I am asking the question. If he answered differently why——

The Court: Answer the question.

A. The bill of parts was itemized what it was for. It involved some parts and working on the tractor and the telephone calls and everything incidental to getting it back in shape.

Q. The question was: Was that made necessary due to the fact that the repairs were not started when Bastain [63] had all of the parts there and could have gone ahead?

A. I would say if the insurance company would have assured him of the money so he could go ahead on it, that we could probably have gotten away from some of that expense, yes.

Q. Wouldn't you have gotten away from all of that expense?

A. Well, that is a condition that didn't happen so we wouldn't know. I wouldn't be concerned with that expense had it been that way because I would have had the machine and could have been logging with it.

Q. Now these parts that you went around to get,—and you have listed in separate accounts—are they not also included in Bastain's bill?

A. I would have to have both copies; I don't believe they are. They are not supposed to be. If they are, why, they will be credited to me.

(Testimony of J. W. Van Meter.)

Q. Well, do you mean they would be credited to you in that bill?

A. Yes. Yes, here is \$44.75 worth of them—that is part of them; that is a portion of them.

The Court: Are they included in that bill?

The Witness: Part of them are—not all of them.

Q. (By Mr. Clarke): There are some duplications, though, [64] in these bills are there not?

A. There are nine pieces here that he gave me credit for. If I remember right there were eighteen or twenty pieces that I paid for out of my pocket. The rest of them have got to show up on another statement.

Q. Didn't you go over these bills beforehand so they could be submitted as a direct statement?

A. Yes, sir.

Q. But there are still now, as submitted, some duplications? A. Yes.

Mr. Clarke: I have no further questions.

Redirect Examination

By Mr. Olsen:

Q. Will you look on page 7 of Exhibit——

A. That is where I am now. That is this small list of parts.

Mr. Clarke: Wait a minute. I do have another question.

(Testimony of J. W. Van Meter.)

Cross-Examination (Continuing)

(Photograph marked Defendant's Exhibit A-1 for identification.) [65]

Q. (By Mr. Clarke) I hand you some pictures which have been marked Defendant's Exhibit A-1 for identification and ask you if you recognize them as being pictures of this equipment taken two or three days after the fire?

A. Yes, sir; that is me sitting on the tractor. This is the first time I have got to see these pictures,

Q. You remember when they were taken?

A. Oh, yes.

Mr. Clarke: We offer them for the purpose of illustrating the type of equipment and the approximate condition after the loss, visually.

The Court: They may be received.

(Defendant's Exhibit A-1 received in evidence.)

Mr. Clarke: I have no further examination.

Redirect Examination (Continuing)

By Mr. Olsen:

Q. Referring to Plaintiffs' Exhibit 7 on the seventh page, I note there is listed a part, it says "Less parts listed above and purchased by Mr. Van Meter." Do you see that?

A. Yes; that is right.

Q. Those parts were furnished by you?

A. That is right. [66]

(Testimony of J. W. Van Meter.)

Q. And presumably are listed in the forepart of the list, is that right? A. Yes.

Q. Looking at that, it indicates, does it not, that he had deducted from his bill the parts furnished by you? A. Yes.

Q. So he has given you credit for parts furnished by you? A. That is right.

Q. And so in view of that do you think there is any duplication in that Exhibit 7 of parts that you furnished?

A. No, there would not be then.

Q. Speaking of the ability of Mr. Bastain to repair the tractor promptly in its relation to avoiding some expenses, what, if any, expenses could have been avoided by that; that is, I mean actual expenses you have testified to here?

A. Would you repeat the question please?

Mr. Olsen: Strike the question.

Q. Outside of the expenses of the trip to Portland, would it have been possible to have avoided any of the expenses that were later incurred?

A. Yes; if he would have got to go ahead on the tractor and put it together when he had the parts earlier in the winter.

Q. You might have avoided that expense of the trip to [67] Portland? A. Yes.

Q. But you couldn't have avoided any of the other expenses? A. No.

Mr. Clarke: I object to that as being leading.

Q. (By Mr. Olsen) Could you have avoided any of the other expenses? A. No.

(Testimony of J. W. Van Meter.)

Q. Such as your own time and so on?

A. No.

Q. When Mr. Bastain made an estimate of the cost of repairing this, do you recall what his estimate of the labor charge would be?

A. It is in the neighborhood of \$2,000.

Mr. Clarke: I object to that as hearsay and not the best evidence.

Mr. Olsen: I asked him if he recalled.

Mr. Clarke: He started to say the amount.

The Court: Sustained.

A. Yes, I do recall it.

Q. (By Mr. Olsen) Do you recall what the approximate amount of the labor expense was made by Mr. Bastain after the fire? [68]

Mr. Clarke: I object to that as hearsay.

The Court: Sustained.

Q. (By Mr. Olsen) Calling your attention to page 8 of Exhibit 7, there is an item there of total labor of \$665.00; is that a relatively small labor charge?

A. Yes. This is the labor for the mechanic that was employed by the Bastain Equipment Company. The reason why it took so little is because the fellow employed by me and myself worked for two weeks on it. That is what cuts down the labor.

Q. In other words, you did most of the labor in repairing it?

A. Yes, we had to do a lot of mechanical work on that machine over again. He had a lot of stuff put together backwards.

(Testimony of J. W. Van Meter.)

Mr. Olsen: That is all.

Mr. Clarke: No further questions.

The Court: Mr. Van Meter, you didn't request this insurance policy, as I understand it was done by Lipman and——

The Witness: Esfeld; Sol Esfeld.

The Court: It was done by them?

The Witness: Yes.

The Court: Now, did you ask them to get [69] insurance for you?

The Witness: Yes; yes—Sol Esfeld.

The Court: Did you designate the company?

The Witness: I didn't designate any company. Sol Esfeld and I sat down at his desk like we always did. I have done lots of business with him—and talked over insurance.

The Court: You didn't designate any particular company?

The Witness: No.

The Court: Tell me what was said as near as you remember between you and Mr. Esfeld about the kind of insurance you were buying.

The Witness: I wanted insurance to protect this tractor in case a tree fell on it while it was in the woods, or if we should upset it—if the truck driver should dump it off the truck while he was going around a curve or loading or unloading it and against fire. I knew of tractors that had been upset and I knew of tractors that had had trees pulled over on them with a line. Those are the three worst hazards. He said "The premium will be drawn that

(Testimony of J. W. Van Meter.)

way." The premium was \$238.50. I was always careful of figures in all the business I did with him. When I walked out of the office I expected the policy would be mailed. [70] I didn't think of it any more.

The Court: You used the term "Marine insurance" this morning?

The Witness: That is right.

The Court: There was some discussion about that?

The Witness: Yes.

The Court: What was the discussion about that as near as you can remember?

The Witness: A Marine insurance policy was a different policy than I had ever had on any of the trucks. They had sold insurance for a lot of different companies—they write for a lot of different companies and I can name a lot of them. I had had insurance from other agents, too. But this Marine was a special policy for this different type of equipment.

The Court: Did you ever hear of that insurance policy, the Marine policy, before this day when you talked with Mr. Esfeld?

The Witness: I can't say for sure that I had any policies before with them.

The Court: Do I understand you to say that he explained that to you?

The Witness: Yes.

The Court: What did he say that was? [71]

The Witness: That a Marine policy differed in

(Testimony of J. W. Van Meter.)

the one way that it was good any place; a Marine policy—what it suggested to me was for boats or heavy industrial machinery, or something of that nature to be moved.

The Court: Did he say anything about it covering property out of the State of Washington?

The Witness: I don't think so. I don't think it was discussed either way.

The Court: What I am getting at is what kind of insurance did you order.

The Witness: I wanted insurance that would be good any place.

The Court: What was said about that if anything by either of you or this other gentleman?

The Witness: Well, I told him and Pete Thomas,—I told,—the old man Pete Thomas was a friend of mine and O.K.'d everything that ever happened with the company. For a long time, for at least a year before this—that I was going to move the operation into the State of Oregon.

The Court: You told him that?

The Witness: Yes.

The Court: During that talk with Mr. Esfeld?

The Witness: During the time when I purchased [72] this tractor.

The Court: You told Esfeld that?

The Witness: Yes.

The Court: That you were going into Oregon?

The Witness: Yes; but that it would not be soon—that it would be sometime during the following year.

(Testimony of J. W. Van Meter.)

The Court: Was that while you were talking about the insurance or at some other time?

The Witness: No; at that same time.

The Court: You told him that you were going with this equipment into Oregon?

The Witness: Possibly,—I had a short job logging in Lewis County but my next job would be in Oregon, and I made several trips into Oregon investigating lumber jobs, some with the Pope and Talbott Company, and some in the pine in eastern Oregon. Finally I decided on the eastern Oregon job. You see I was looking with a view to the future about this other job and trying to get them to finish it. I tried to let them know my plans in advance because I had been borrowing money from this company for a long time. That is the story.

The Court: What was said by either of you or him about insurance that covered you out of the State [73] of Washington?

The Witness: Well, I can't positively say just what was said.

The Court: Was there anything said about it?

The Witness: I just wouldn't want to answer that yes or no and be honest with you.

The Court: But you did tell him that you were taking this property into the state of Oregon?

The Witness: Yes. They knew for sometime that I was expecting to go to Oregon.

The Court: How long did that job last in Oregon?

The Witness: It lasted until—well, we spent the

(Testimony of J. W. Van Meter.)

summer on it. In the fall of that year, why, this firm that we had a subcontract with sold out to a firm in New York. They have long wet winters there and muddy roads and I had an opportunity to go on a job in California where the season is a little better.

The Court: When you moved to California, did you say anything to these insurance agents about it?

The Witness: I made a special trip in my automobile 350 miles to Portland to get permission from the finance company that was then financing me before I took the equipment out of the State. You see I owed them in the neighborhood of \$30,000 and it is not [74] good policy to pick up that machinery and put it on a train and take off without making arrangements.

The Court: Was that before you went to Oregon?

The Witness: California.

The Court: California?

The Witness: Yes. This Seattle company had lots of knowledge of my moving to Oregon, don't you see? The only people that I was obligated to for my move to California was the finance company that was financing my paper at that time.

The Court: That was the American Discount?

The Witness: That was the Granning-Treece Company of Portland. This Seattle firm had known all along and we had had correspondence. That had been exhibited—from Wallowa, Oregon.

The Court: While you were in California, and

(Testimony of J. W. Van Meter.)

before the fire, did you have any correspondence—well, when did you refinance again—before you left Oregon?

The Witness: Oh, yes. Before I moved to Oregon.

The Court: What?

The Witness: I say I refinanced before I moved to Oregon.

The Court: Oh, before you went to Oregon. [75]

The Witness: Yes.

The Court: I believe that is all.

Mr. Clarke: I have a couple of questions.

Recross Examination

By Mr. Clarke:

Q. When you first broached the question of going to Oregon on to Mr. Esfeld of the American Discount, he refused to finance your operation there, is that not correct?

A. Yes; yes, he declined to advance me this additional \$11,000 that I needed to purchase some more equipment I wanted and suggested that I get some money in Portland, which I did.

Q. Did I understand you to say that you had told him before that time, and when he originally financed you, that you were going into Oregon?

A. Yes. You see, most every business transaction I had with the office down there at the Smith Tower had to have the approval of Mr. Pete Thomas, this associate of the company.

(Testimony of J. W. Van Meter.)

Q. I am talking now about Mr. Esfeld.

A. I know you are. Mr. Esfeld and Mr. Thomas and myself had had a number of conversations about locations where I might log. [76]

Q. Just to get this straight: Do I understand you to claim that before the American Discount Company financed this equipment at all, that you told them you were intending to go to Oregon?

A. Yes; that should be your understanding.

Q. You did tell them?

A. Yes; they knew I intended to go to Oregon the next year.

Q. But when you came to them and asked them to finance the undertaking they then asked you to take your business and refinance somewhere else?

A. They wouldn't have asked me to take my business elsewhere except that I wanted to borrow \$11,000 and they didn't want to stick that much money in the equipment when I was going to take my business down to Oregon. There was no ill-will there. I was moving quite a ways away and didn't expect to come back.

Q. That was the first time that they had any definite knowledge that you were up to the point of intending to go to Oregon?

A. Well, now, that would be up to them to interpret what their understanding was.

Q. That was the first time that you yourself had come to any definite conclusion to go to Oregon?

A. I might say that that is the time when I decided to go.

(Testimony of J. W. Van Meter.)

Q. Up to that time all of your operations had been within [77] the State of Washington?

A. I came from Oregon, you understand, before I was ever logging in Washington. I was in the truck business for years in Oregon and moved up here in '39 and two or three years later became acquainted with this company and they did a part of my financing.

Q. All of your financing that they had done up to that point had had to do with operations in Washington?

A. Yes.

Q. Then actually, prior to the time that you moved your equipment to Oregon, the American Discount Company had been paid off in full and Granning & Treece had taken over all of the financing, is that correct?

A. Yes.

Q. So that before you moved to Oregon, the American Discount Company was entirely out of your financing?

A. They received——

Mr. Olsen: If your Honor please, he has definitely testified that he moved a few days before. I don't think it is necessary to go over that ground.

Q. (By Mr. Clarke) You did not refinance again when you moved to California?

A. No.

Q. Your financing was still held by Granning & Treece? [78]

A. That is right.

Q. When you moved to California, you didn't

(Testimony of J. W. Van Meter.)

notify the American Discount Company or Lipman & Esfeld anything about that move?

A. I didn't feel that I was obligated to notify them.

The Court: What is that? I didn't hear.

A. I didn't feel that I was obligated to notify them of where or when I moved. I did, however, notify the present finance company, Granning & Treece, and supposed that everything was in order. I wasn't thinking with a view to insurance.

Q. You knew that Granning & Treece at that time had possession of your insurance policy?

A. I don't know about that. A fellow would suppose that they would have everything in the way of papers relating to the equipment—having a mortgage on it, you know.

Q. Do you remember signing an authorization whereby you authorized the American Discount Company to send all papers, including insurance policies, down to Granning & Treece?

A. I believe I signed that in Mr. Treece's office.

Q. And that was prior to your refinancing with Granning & Treece or was a part of your refinancing?

A. Yes, sir. It was a part of the deal.

Mr. Clarke: I have no further questions. [79]

Mr. Olsen: I have no further questions.

The Court: Maybe I asked you this before. If I did, I don't quite understand it.

The Witness: O. K.

(Testimony of J. W. Van Meter.)

The Court: Before or at the time you told these agents that you wanted this insurance, did you tell them that you were going out of the State of Washington?

The Witness: Yes.

The Court: When was that—before or at the time; when was it?

The Witness: That was before the fire—I mean before I bought this TD-18 tractor, prior to that. I would come in town at maybe two or three months' intervals from wherever I happened to be logging in the State of Washington to see them or other business. I would stop in and see Mr. Thomas or Mr. Esfeld quite frequently. I had several conversations—not a lot of them—but anyway two or three that I expected to leave the State. You see, I had logged all over the State of Washington and contract jobs were hard to get.

The Court: That was with Lipman & Esfeld?

The Witness: Yes.

The Court: We will take a few minutes' recess, [80] gentlemen.

(Witness excused.)

(Recess.)

Mr. Olsen: I would like to call Mr. Mullins.

JOHN R. MULLINS

a witness called on behalf of the Plaintiffs, having been duly sworn testified as follows:

Direct Examination

By Mr. Olsen:

Q. Will you please state your name.

A. John Mullins.

Q. Where do you live?

A. Portland, Oregon.

Q. I will ask you by whom were you employed during the month of April, 1945?

A. Granning & Treece.

Q. In what capacity?

A. Office Manager.

Q. What is the business of Granning & Treece?

A. Financing of automobiles, automotive equipment.

Q. I will ask you whether or not it was your duty or some of your duties to examine papers when they came in on a loan being closed? [81]

A. Yes, it was.

Q. Do you recall the time Granning & Treece made a loan to J. W. Van Meter? A. I do.

Q. Do you recall receiving or having turned over to you for checking a Franklin Fire Insurance policy, Plaintiffs' Exhibit 1, No. 8629, do you recall having received that in the mail?

A. I received the complete file for checking. If this policy was in effect at that time it was a part of the file.

Q. Did you examine that policy? A. Yes.

Q. I will ask you whether or not you noticed the provision there relative to coverage being limited to the State of Washington? A. No.

Mr. Clarke: I object to the question of whether or not he noticed it because in examining he is bound in law to notice it.

The Court: Overruled. You may answer the question. Did you notice it?

The Witness: No, I did not. I don't recall that. [82]

Q. (By Mr. Olsen) Did you notice the form of the policy? A. Yes.

Q. Were you familiar with the general form?

A. Yes.

Q. You identified it by inspection as what they called an Inland Marine policy?

A. I don't know as I paid much attention to that phase.

Q. I call your attention to the condition on the reverse side of the policy and ask if you noted that provision 1, "Territorial Limits"?

A. I believe I did because most policies carry their provisions in printed form. We usually scan those.

Q. This provision 1 reads, "Territorial Limits. This policy covers only within the limits of the United States and Canada." Did the presence of that provision in the policy cause you possibly to overlook checking the other provisions of the policy?

Mr. Clarke: Objected to as leading.

The Court: Sustained.

(Testimony of John R. Mullins.)

Q. (By Mr. Olsen) After you examined the policy, what did you notice with reference to the payee of the policy?

A. I noted that my firm was not protected in the case of loss. [83]

(Letter marked Plaintiffs' Exhibit 16 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs' Exhibit 16 and ask you to state what that is.

A. That is a letter to Lipman & Esfeld requesting a loss payable endorsement or rider form to the policy in favor of Granning & Treece.

Q. What is that slip attached to that letter?

A. That is a memorandum requesting the same form in the case of the Franklin Fire Insurance policy.

Q. Are those pencil markings yours?

A. No, they are not.

Q. Do you identify them as being any particular person's pencil marks? A. No.

Mr. Olsen: I offer this in evidence.

Mr. Clarke: We have the same objection that it is immaterial and irrelevant to the points at issue.

Mr. Olsen: I offer Plaintiffs' Exhibit 16 in evidence.

The Court: Overruled. It may be received.

(Plaintiffs' Exhibit 16 received in evidence.)

[Plaintiffs' Exhibit 16 set out on pages 58-59.]

Q. (By Mr. Olsen) Have you made inquiry as

(Testimony of John R. Mullins.)

to whether or not Granning & Treece have a copy of any reply received [84] at about that time from Lipman & Esfeld; have you made inquiry to ascertain whether they had the original of a reply received from Lipman & Esfeld referred to in that?

A. That was a conversation over the telephone.

Q. What was their reply?

A. That they had no such letter.

(Letter marked as Plaintiffs' Exhibit 17 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs' Exhibit 17 and ask that you look that over and say whether or not that is a correct copy of a letter received by your office at or about the date that it purports to have been sent?

A. I would say it was because I particularly recall parts of it.

Q. I might ask you: What was there about this loan that caused you to remember it rather distinctly?

A. The rather unusual amount involved; considerably more than the average run of loans.

Mr. Olsen: I offer Plaintiffs' Exhibit 17 in evidence.

Mr. Clarke: The same objection as to the previous exhibit.

The Court: The same ruling.

(Plaintiffs' Exhibit 17 received in evidence.)

[Plaintiffs' Exhibit 17 set out on pages 59-60.]

(Testimony of John R. Mullins.)

(Letter marked as Plaintiffs' Exhibit 18 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiff's Exhibit Number 18, and ask you what that is.

A. That is an acknowledgment of receipt of the loss payable endorsement for the two policies.

Mr. Olsen: I offer that in evidence.

Mr. Clarke: I make the same objection.

The Court: The same ruling.

(Plaintiffs' Exhibit 18 received in evidence.)

[Plaintiffs' Exhibit 18 set out on page 61.]

Q. (By Mr. Olsen) In Plaintiffs' Exhibit 18, you refer, in reply to their request, that you will have to write to Mr. Van Meter for approval of an advance, do you not? I will ask you whether or not you or any company made that advance?

A. No, I do not.

Q. After you checked the insurance policy circumstances, what did you do with them?

A. They were placed in the collateral file along with the mortgage.

Mr. Olsen: That is all. [86]

Cross Examination

By Mr. Clarke:

Q. Did you have any part in the personal negotiations with Mr. Van Meter concerning the placing of this loan? A. No.

Q. Your duties then were confined to examina-

(Testimony of John R. Mullins.)

tion of the various documents that came down from the American Discount Company?

A. Yes, that is correct.

Q. You have stated that among other things you examined this Franklin Fire Insurance policy?

A. I examined all papers in the file, yes.

Q. Including this policy? A. Yes.

Q. The purpose of your examination was to determine whether or not the coverage was proper?

A. Yes.

Q. It is your business to examine numerous of these kinds of policies in this type of coverage?

A. Well, that is true.

Q. When you read these policies, do you check to see that the descriptions of the property there are the same as listed in your mortgages?

A. Yes, I do. [87]

Q. Do you remember whether or not you did that in connection with this particular policy?

A. I feel that I did. It is customary.

Q. Then calling your attention to the form attached to the policy "Inland Marine Department" where it says "Inland Marine Department Contractors Equipment Floater Insurance," I will ask you whether the equipment is not listed by model number in typewriting under "2" thereof?

A. Yes.

Q. Immediately following that in Item Number 3, you see the clause "This insurance covers only within the limits of the State of" blank and "Washington" in there in typewriting also? A. Yes.

(Testimony of John R. Mullins.)

Q. That is immediately below this equipment and so forth that you were checking? A. Yes.

Q. You wish to state that you made no notice of that provision in the policy?

A. I just can't recall it. It could have been a slip, you know, on my part.

Q. Did you say you read all of these printed conditions on the back?

A. Well, now, I wouldn't say that I read them all. But [88] we usually scan over the provisions of a policy.

Q. Don't you consider it more important to read the typewritten provisions than you do the printed provisions?

A. My chief concern there was in the rider protecting us.

Q. That is whether or not your name was on there as loss payee? A. Yes.

Q. But it was your further duty to see that it covered the proper property and was in the proper place, was it not? A. Yes.

Q. You customarily on all types of business that you finance hold the insurance policy in your possession as mortgagee, don't you? A. Yes.

Mr. Clarke: There is in the file a deposition of Sol Esfeld that has a letter in it that I would like to refer to.

(Letter marked as Defendant's Exhibit A-2 for identification.)

(Testimony of John R. Mullins.)

Q. (By Mr. Clarke) You are acquainted, are you not, with Mr. Treece's signature?

A. Yes.

Q. I hand you Defendant's Exhibit A-2 and ask you whether [89] or not you recognize that as a letter written by your office?

A. I would say that it was because it is on their letterhead that that is Mr. Treece's signature.

Q. What is the attachment thereto?

A. That is an authorization for pay-off, including a description.

Q. That is customarily taken by your firm when they finance property?

A. Yes; that is their authorization.

Q. I will ask you whether or not that is Mr. Van Meter's signature?

A. I can't say for sure.

Q. That is the authorization to the American Discount Company to send all papers down to you?

A. Yes.

Mr. Clarke: Have you seen this?

Mr. Olsen: Yes.

Mr. Clarke: We offer this in evidence at this time.

Mr. Olsen: No objection.

The Court: It may be received.

(Defendant's Exhibit A-2 received in evidence.)

[Defendant's Exhibit A-2 set out on pages 62 to 64.]

Mr. Clarke: No further examination at this [90] time.

Mr. Olsen: That is all.

(Witness excused.)

The Court: We will now take a recess until tomorrow morning at 10:00 o'clock.

(At 4:00 p.m., Monday, September 16, 1946, Court recessed until the following day at 10:00 a.m., Tuesday, September 17, 1946, in the United States Court House.) [91]

Seattle, Washington, September 17, 1946, 10:00 a.m.

(All parties present as before.)

The Court: You may call your next witness.

Mr. Olsen: Mr. Cooper.

FRANK COOPER

a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olsen:

Q. Will you please state your name?

A. Frank Cooper.

Q. What is your business connection, Mr. Cooper?

A. Branch Manager of the Howard Cooper Corporation, Seattle.

(Testimony of Frank Cooper.)

Q. What is their business?

A. Construction equipment and logging equipment.

Q. Any particular line of equipment—that is, speaking of manufacturing?

A. International Harvester, J. D. Adams. [92]

Q. How long in that business?

A. Well, it could have been in business for about thirty years.

Q. How long have you been in business?

A. About ten years.

Q. In that capacity you bought and sold International Harvester tractors, have you?

A. That is correct.

Q. Of the heavy type? A. Yes, sir.

Q. You are conversant with their values, are you? A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit 1 and ask you to note the description of that International Harvester tractor therein and ask you: Are you familiar with that model and style and size?

A. Yes, sir.

Q. What year model is that?

A. About a 1943, as near as the serial number indicates.

Q. Assuming a tractor of that description is in good working condition and has recently been overhauled at an expense of approximately \$600, and to all intents and purposes is in good working condition, what would be your opinion as to its value on or about the first of October, 1945? [93]

(Testimony of Frank Cooper.)

Mr. Clarke: Objected to on the ground that this witness has not seen the particular piece of equipment. It was a used piece of equipment, and any testimony that he could give in that regard without having seen it would not have much probative value.

The Court: Can you answer the question?

The Witness: Your Honor, as a general rule tractors in the past few years have been selling at certain prices under the OPA regulations and any tractor that has been in good condition, they have been getting 85 per cent of the value of the tractor without question.

Q. (By Mr. Olsen) You say 85 per cent of the value; you mean 85 per cent of the new price?

A. That is right.

The Court: Wait just a minute. Do I understand you to say they are just lumped together in one category or class?

The Witness: Yes.

The Court: Regardless of the individual condition of them. is that right?

The Witness: If the seller will put a warranty on the tractor of its being in good condition they are allowed to charge by the OPA eighty-five per [94] cent of the new price. That is what they have been doing and in some cases more than that. They are then in violation of the OPA rules.

The Court: Overruled. You may answer.

Q. (By Mr. Olsen) What is your opinion as to the value of the tractor then—this tractor on or about October 1, 1945, having in mind, first, that it is a used tractor in good condition?

(Testimony of Frank Cooper.)

A. The new sales price was \$10,500.00—roughly it would be 85 per cent of that.

Q. 85 per cent of \$10,500.00?

A. Yes. [95]

Mr. Olsen: I would like to call Morton Pinch as an adverse witness.

MORTON PINCH

called as an adverse witness by and on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olsen:

Q. Please state your name.

A. Morton Pinch.

Q. What is your business connection?

A. Insurance agent, partner with Lipman & Esfeld.

Q. How long have you been in the insurance business?

A. Since 1924, other than about a year's time.

Q. Do you recall issuing this policy TR-8629 of the Franklin Fire Insurance Company of Philadelphia, Plaintiffs' Exhibit 1? [100]

A. We did not issue the policy. The policy was ordered from the branch office of the Franklin Fire Insurance Company.

Q. Do you recall signing it?

A. Not specifically, no.

(Testimony of Morton Pinch.)

Q. Those are your signatures, are they?

A. Yes.

Q. Have you issued this policy upon a number of occasions?

A. The Franklin Fire Insurance Company have issued it for our office.

Q. You have signed it for them upon a number of occasions?

A. I have signed it for them.

Q. Are you familiar with the printed provisions of it?

A. Most of the printed provisions I am familiar with.

Q. I will ask you when you signed this policy were you aware of the provisions in the endorsement to the effect that coverage is limited to the State of Washington?

A. I don't think at the time that I paid much attention to that.

Q. You were not aware of it?

A. At least it was not directed to my attention.

Q. You signed it?

A. I signed it, yes.

Q. I hand you Plaintiffs' Exhibit 16, and ask if you recall having received that letter from Graning & [101] Treece,—or did you receive it, I mean?

A. Yes.

Q. And the little attachment there, you received that, did you?

A. I am not sure just when we received the attachment. It was attached to this letter and we

(Testimony of Morton Pinch.)

turned the file over. I don't know if it came with the letter, or how soon afterwards. It was a part of the file. There is no date on the memorandum we received.

Q. Whose handwriting is on that?

A. The word "balance" is mine and the other words are Mr. Goldman's.

Q. Did your office receive that letter, Plaintiffs' Exhibit 4? A. It appears to be.

Q. You say it did.

A. It was addressed to us. I guess we received it.

Q. You received it—it was in your files?

A. Yes.

Q. I hand you Plaintiffs' Exhibit 17, being copy of a letter dated May 18, 1945, to Granning & Treece; I ask you whether or not that is a correct copy of a letter you sent to that office?

A. Yes.

Q. I hand you Plaintiffs' Exhibit 15, which purports to [102] be a letter dated May 18, 19—I believe your date is wrong—it is 1946, but it should be 1945,—would the correct date of that letter be May 18, 1945? A. Yes.

Q. Is that a correct copy of the letter that you wrote to Mr. Van Meter on that date?

A. It appears to be.

Q. The copy that is attached, is that a correct copy of a letter that you wrote to Granning & Treece? A. It appears to be.

Q. In the third paragraph of that letter you re-

(Testimony of Morton Pinch.)

ferred to "contractors' equipment policy on International Tractor"? A. Yes.

Q. And that is the policy that is involved in this action, is it? A. Yes.

Q. Handing you Plaintiffs' Exhibit 5, I ask you if that is a letter you wrote to Mr. Van Meter at Wallowa County, Oregon, on May 14, 1945?

A. Yes.

Q. I hand you Plaintiffs' Exhibit 14 and ask you if that is a copy of a letter addressed to Graning & Treece which you sent to Mr. Van Meter on the date of that letter? [103]

A. Yes.

Q. I will ask you whether you considered this policy in force all during that period?

Mr. Clarke: Objected to as to what the consideration or conclusion of this witness is as immaterial.

The Court: Sustained.

Q. (By Mr. Olsen) I will ask you whether it was your understanding that the policy was in force?

Mr. Clarke: The same objection.

The Court: The same ruling. There is no denial on the part of the defendant that it was in force, is there?

Mr. Clarke: As written.

Q. (By Mr. Olsen) Did you at any time prior to the occurrence of this fire know the presence of this provision in the policy limiting it to the State of Washington?

(Testimony of Morton Pinch.)

Mr. Clarke: Objected to as immaterial.

The Court: Overruled. You may answer.

A. I was not aware of it.

Q. (By Mr. Olsen) You were familiar with the printed provisions [104] of the policy, were you not, the printed provisions?

A. Most of them.

Q. As far as you knew, there was nothing in the policy which would affect its validity during this period?

Mr. Clarke: Objected to upon the ground that as to what his knowledge or thoughts may have been with reference to this particular policy, or whether it was or was not valid at any time are utterly immaterial.

Mr. Olsen: If Your Honor please, he is the authorized agent of the insurance company, and he is the one who issued this policy, and he is the one who is authorized to act. If he did not consider the insurance in effect or had any knowledge that it was not in effect, it seems to me it might be material.

The Court: The defendant does not deny it being in effect, as written of course, so I don't think there is any question about that. Sustained.

Q. (By Mr. Olsen) In your various correspondence with Granning & Treece and J. W. Van Meter, were you trying to explain that the policy was in effect?

Mr. Clarke: Objected to upon the ground that the correspondence is the best evidence and speaks for [105] itself.

(Testimony of Morton Pinch.)

The Court: Sustained.

Mr. Olsen: I think that is all.

Cross Examination

By Mr. Clarke:

Q. Mr. Pinch, did you have any conversation with Mr. Van Meter or with anyone prior to the issuance of this policy concerning what was to be contained therein? A. No.

Q. Where you are issuing a policy of this type, where is the decision made as to the territorial limitations?

Mr. Olsen: I object to that, Your Honor. This party is an agent and it is not material as to who decides that fact—whether or not it is the office boy or the president. The fact is that the company is responsible for the acts of its agents, and it is immaterial as to who makes the decision.

The Court: You are asking about the custom.

Mr. Clarke: Yes, Your Honor.

The Court: I doubt that. Sustained.

You might ask him about this particular policy if you want to.

Q. (By Mr. Clarke) Mr. Pinch, relate to the best of your [106] recollection the circumstances concerning the issuance of this policy in so far as they are within your own personal knowledge.

A. Well, actually I don't recall the ordering of the coverage but it was the practice at that time, under these conditions for Mr. Esfeld of the American Discount Company to order the coverage from

(Testimony of Morton Pinch.)

an employee of our department or our agency; and the employee in turn would order the coverage from the branch office of the Franklin Fire Insurance Company—since as I stated we do not issue that type of policy in our office. There are always certain things about it that have to be embodied, and it is up to the company to actually pass upon it. So our employee, in turn, as I say must have ordered the policy from the Franklin Fire Insurance Company who in turn would mail us the policy. The policy ordinarily is scanned over or checked by the person that ordered the coverage. In this instance, in view of the fact that the American Discount Company had a loss payee interest in the policy, after I signed—countersigned the policy as an agent for the Franklin Fire Insurance Company, they would then check the policy to determine if there was anything left out that should have been in the policy.

Actually in the case I didn't have anything to [107] go by. It was ordered. The Franklin Fire Insurance Company has a memorandum as to the order having come from their office and they issued a policy accordingly. It was incumbent upon me, I suppose, to check and see if the policy was written properly. To my best knowledge at the time it was. I didn't notice anything unusual about the policy or the contract.

We then would have turned, as I say, the policy over to the American Discount Company. The bill

(Testimony of Morton Pinch.)

in this case for the premium was not charged to the American Discount Company as sometimes we do if arrangements are so made. But instead, as a matter of practice, it should have been and I imagine it was, mailed out to Mr. Van Meter. And along with it should have gone a copy of the policy, because we generally get a couple of extra copies from the Franklin Fire Insurance Company, the issuing company on this type of contract and there would be no reason for us to retain extra copies in our office when the assured—the insured—did not have—wouldn't be getting the original policy. As a matter of course I can't recall all of these things. As a matter of form a form letter goes out——

Mr. Olsen: I think possibly the answer is not [108] responsive to the question; it is going a little bit beyond the question.

Mr. Clarke: I think I have nothing further.

Mr. Olsen: I want to ask the witness a few more questions on direct examination if I may, your Honor.

Further Direct Examination

By Mr. Olsen:

Q. In your letter of May 18, Plaintiff's Exhibit 15, you refer to a balance of \$204 and some cents owing on the insurance account. A. Yes.

Q. And you explain, I believe that approximately \$138.61 of that represents a balance on this Franklin Fire Insurance policy. A. Yes.

Q. Was that sum later paid? A. Yes.

Q. About what date?

(Testimony of Morton Pinch.)

A. Well, our records show that we received it in June—the first part of June—from the American Discount Company. It seems that we continued to write—as it is now developed we continued to write Mr. Van Meter for the balance after it was paid to the American Discount [109] by Granning & Treece.

Q. Have you found out that this \$138.00 was collected by the American Discount Company at the time their loan was paid off?

A. I have since found it out.

Q. And that is the fact, is it?

A. It appears to be.

Q. And they later turned that \$138.00 over to you?

A. That is right.

Mr. Olsen: That is all.

Mr. Clarke: No further questions.

The Court: Mr. Pinch, as I understand you to say, you did not talk to the plaintiff, Van Meter, about the issuing of this insurance policy?

The Witness: I think I can safely say that, your Honor, I don't recall having talked to Mr. Van Meter about the issuance of the policy.

The Court: Do you know of his talking to anyone that you know of?

The Witness: In our office, Mr. Van Meter has testified he talked to Mr. Esfeld about issuing the policy.

Let me state this: We took over the agency in April, 1944.

The Court: That is Lipman & Esfeld. [110]

(Testimony of Morton Pinch.)

The Witness: Lipman & Esfeld. Mr. Esfeld was the sole owner of the agency prior to that time or at that time. He had run the business practically exclusively, I mean dominantly. He was the head of the business and ran the business. So he was familiar with the insurance coverages and conditions. I was out of the office for about a year prior to April '44, and then I came back to the office and more or less stepped into his shoes.

Mr. Van Meter, as I say, had testified he ordered the coverage from Mr. Esfeld after discussion as to what he wanted and what was best for him. Mr. Esfeld, in turn—I think his deposition states that he turned over the information to one of our employees in good faith, naturally, and thought that he was taking care of it exactly as I would have taken care of it had the coverage been ordered from me direct.

The Court: Did you know Mr. Van Meter at the time you signed the policy?

The Witness: I knew him, I think, by sight at about that time. I don't recall having talked to him very much before that time.

The Court: Did you or did you not know he was a logger?

The Witness: I knew he was a logger. [111]

The Court: Did you know that his business was accepting logging contracts up and down the Pacific Coast, both in and out of the State of Washington?

The Witness: I would qualify that by saying

(Testimony of Morton Pinch.)

that I would have to know that he accepted contracts for logging. But as to whether he would go beyond the State of Washington, I wouldn't know that. I can amplify that by saying that the American Discount, as it is indicated here, was not interested in financing and additional equipment for him when he took it out of the State. Their practice is generally to confine their loan to the State of Washington, so something of that nature wouldn't generally come up.

The Court: Is the firm of Lipman & Esfeld a corporation?

The Witness: A co-partnership.

The Court: Were you one of the partners on the day that you signed the policy.

The Witness: Yes.

The Court: Is the American Discount Company a corporation—was it on that day?

The Witness: At that time I think they were a co-partnership.

The Court: Were you interested in the American [112] Discount Company on the day on which you signed the policy?

The Witness: No.

The Court: You had no——

The Witness: No financial interest whatsoever.

The Court: Was any office holder on anyone interested in Lipman & Esfeld an officer in the American Discount Company?

(Testimony of Morton Pinch.)

The Witness: No. There was no inter-relationship between our company.

The Court: They were separate and distinct?

The Witness: That is right.

The Court: All right. Who else was interested in the Lipman & Esfeld Company on that date?

The Witness: My co-partner, Abe Goldman.

The Court: Goldman?

The Witness: Yes.

The Court: How did you happen to request the policy; who came to you—who asked you for it?

The Witness: As I say, to my best recollection or as a matter of practice at that time, Mr. Esfeld ordered it from one of our girls who handles that end of the business. She would have automatically ordered it from the Franklin Fire, because we give [113] them most of that class of insurance.

The Court: He was not then interested——

The Witness: No. As I say he would have handled it about the same as I would at that time.

The Court: How long have you lived in the State of Washington?

The Witness: Since 1905.

The Court: Have you ever taken any other application for logging insurance—I mean from logging contractors?

The Witness: Most of that stuff is in connection with the American Discount.

The Court: I mean have you ever issued policies for them?

The Witness: Yes.

(Testimony of Morton Pinch.)

The Court: What is their custom in this State? I know nothing of it. Logging to me is foreign.

The Witness: Well, it is kind of foreign to me, too.

The Court: What is the custom of these logging contractors in the State of Washington with reference to their place of work; do they go out of the State or do they stay in the State of Washington?

The Witness: Well, I am not expert on that [114] either but I think by and large they stay in the State. There certainly ought to be enough timber around here for logging for a period of time, at least for the length of the currency of the policy. There might be occasion to go down to Oregon, but for one year's period, the length of time of the policy—Mr. Van Meter has testified that they logged here and they most likely would confine themselves to one area.

The Court: These other policies that you have issued for loggers, do they state within the State?

The Witness: It is the practice to confine them within the State.

The Court: Who requested this policy?

The Witness: Mr. Esfeld requested it from one of our employees.

The Court: What employee?

The Witness: It would have been Miss Weiss in our office.

The Court: Where is Miss Weiss?

The Witness: She is still in our office.

(Testimony of Morton Pinch.)

The Court: When you issued the policy——

The Witness: Yes, we ordered the policy.

The Court: I mean when you signed it.

The Witness: Yes.

The Court: Did you know that Mr. Van Meter [115] wanted a policy that covered him out of the State of Washington?

The Witness: No.

The Court: Did you pay any attention to what kind of a policy you got him in that respect?

The Witness: I knew it was this form that would ordinarily be issued on that type of equipment; they call it a contractors' equipment form. It is a little broader than an automobile policy, if the company wants to write a policy on that type of equipment.

The Court: Does the Franklin Company issue policies of this kind on equipment that goes out of the State of Washington?

The Witness: I suppose they do.

The Court: Did you ever write such a policy?

The Witness: I don't recall that I ever did.

The Court: Did you ever see this limitation clause in any other contract issued by the Franklin Fire Insurance Company?

The Witness: No.

The Court: Did you ever see any without it?

The Witness: I couldn't say that I have—that I recollect.

The Court: That is all. [116]

Mr. Olsen: I wanted to ask just one question.

(Testimony of Morton Pinch.)

Redirect Examination

By Mr. Olsen:

Q. You said Mr. Esfeld had no interest in Lipman & Esfeld. It is a fact, is it not, that you entered into a contract to purchase the business from Mr. Esfeld sometime in April, 1944?

A. Yes.

Q. And that there was a substantial balance owing to him under that contract? A. Yes.

Q. As of the time that this policy was issued in November, 1944? A. That is correct.

Q. Likewise as of the time of this change in April, 1945?

A. Well, the balance was much less at that time.

Q. So he had an interest in it in that respect?

A. He had an unpaid balance. He had no interest in the sense that he had anything to do with the operation of the company.

Q. The Franklin Fire Insurance Company knows that you are carrying on your business under the name of the Lipman & Esfeld, do they not?

A. Yes, they do. [117]

Mr. Olsen: That is all.

Recross Examination

By Mr. Clarke:

Q. This balance is just a flat balance, is it not?

A. Yes.

Q. What I mean by that: Is it in any way

(Testimony of Morton Pinch.)

contingent or payable out of the profits of the agency?

A. No; it is just a straight contract.

Q. You owe the same amount regardless of how much the agency may or may not make?

A. That is correct.

Mr. Clarke: That is all.

Redirect Examination

By Mr. Olsen:

Q. What did you and Mr. Goldman pay Mr. Esfeld for that business?

Mr. Clarke: I don't believe that is material. I object to it.

Mr. Olsen: The price may have been contingent somewhat upon the future business.

The Court: Oh, I don't think that is material.

Mr. Olsen: That is all.

(Witness excused.) [118]

Mr. Olsen: That is the Plaintiffs' case.

(Recess.)

Mr. Clarke: Comes now the defendant Franklin Fire Insurance Company, and without waiving its right to introduce further evidence, moves that plaintiffs' complaint be dismissed upon the ground that there is no evidence introduced by plaintiffs which shows a right of recovery against the defendant and that it affirmatively appears from the

(Testimony of Morton Pinch.)

evidence as introduced today that there is no right of recovery against the defendant insurance company.

I would like to argue that matter somewhat at length at the present time, if your Honor please, because it seems to me that the essential elements of the case are in and that the evidence that might be introduced from now on would not have any great bearing upon the situation.

I think the legal premises which I am prepared to argue apply to the situation as it now exists.

(Mr. Clarke presents argument to the Court.)

(Mr. Olsen presents arugment to the Court.)

(Mr. Clarke present closing argument to the Court.) [119]

(At 12:10 p.m., Tuesday, September 17, 1946, proceedings recessed to 2:00 p.m., on the same day in the United States Court House.)

Seattle, Washington

September 17, 1946, 2:00 p.m.

(All parties present as before.)

The Court: Mr. Olsen, I am very sorry to have to tell you that in view of that Ninth Circuit decision, I see nothing for this court to do except to grant the motion. In that case the mortgagee bank, who was the agent, knew and had known

for years that this house was not used for residential purposes; knew it at the time the policy was issued and knew it for years. I am satisfied that the Ninth Circuit would not let a judgment stand in this case, in view of that [120] case. I am very sorry indeed.

The defendant's motion is granted.

Concluded. [121]

CERTIFICATE

I, Merritt G. Dyer, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ MERRITT G. DYER,
Official Court Reporter.

[Endorsed]: No. 11535, United States Circuit Court of Appeals for the Ninth Circuit. J. W. Van Meter, B. B. Granning and J. D. M. Treece, Appellants, vs. Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed February 3, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth District

No. 11535-L

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Plaintiffs,
Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation, MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants,
Appellees.

STATEMENT OF POINTS
TO BE RELIED UPON

The points upon which appellants intend to rely
on this appeal are as follows:

I.

The Court erred in denying plaintiffs' request for
jury trial and striking plaintiffs' demand for jury
trial.

II.

The Court erred in finding that the plaintiffs
were not entitled to a reformation of the policy as
prayed for in the Complaint.

III.

The Court erred in finding that the plaintiffs' were not entitled to recover on the theory that defendant, through its agents, had waived or was estopped to rely on that provision in the policy purporting to limit coverage to the State of Washington.

IV.

The Court erred in concluding that the decisions of the Ninth Circuit Court of Appeals in the case of *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2nd 333, 108 Fed. 2nd 713 were decisive of the issues in this case.

V.

The Court erred in dismissing the case at the close of the plaintiffs' case on defendants' motion challenging the sufficiency of the evidence.

VI.

The Court erred in denying appellants motion for a new trial.

JONES & BRONSON,
Attorneys for Appellants.

Received Feb. 6, 1947. Clarke, Clarke & Albertson; by D. Fry.

[Endorsed]: Filed Feb. 10, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF
RECORD TO BE PRINTED

Appellants, pursuant to Sub-division 6 of Rule 19, hereby designates that the entire record including the transcript of proceedings at trial transmitted to the Clerk of the Circuit Court of Appeals for the Ninth District be printed with the following exceptions:

1. Omit that part of J. W. Van Meter's testimony commencing with line 19 on page 25 and ending with line 7, page 50 of the transcript of proceedings at trial and in lieu thereof insert the narrative of this part of J. W. Van Meter's testimony attached to the designation of record filed with the Clerk of the District Court appearing at pages 59 and 60 of the record.

2. Omit that part of Howard Cooper's testimony commencing with line 14, page 95 and ending with line 6, page 100 of the transcript of proceedings at trial.

JONES & BRONSON,
Attorneys for Appellants.

Received Feb. 6, 1947. Clarke, Clarke & Albertson, by D. Fry.

[Endorsed]: Filed Feb. 10, 1947.

